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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND

Google, Inc. Plaintiff, vs. Rockstar Consortium U.S. LP and MobileStar Technologies LLC Defendants.	Case No. 13-cv-5933-CW **DEFENDANTS' MOTION FOR § 1292(b) CERTIFICATION FOR INTERLOCUTORY REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 19, 2014 Time: 2:00 p.m. Courtroom: 2, 4th Floor Judge: Hon. Claudia Wilken

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NOTICE OF MOTION AND MOTION FOR § 1292(b) CERTIFICATION FOR INTERLOCUTORY REVIEW

TO PLAINTIFF GOOGLE INC. AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 19, 2014, at 2:00 p.m., Defendants Rockstar Consortium US LP and MobileStar Technologies LLC (collectively, "Rockstar") will and hereby do respectfully move the Court to certify its Order denying Rockstar's motion to dismiss (Dkt. 58) for interlocutory review under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3). Rockstar's motion is based on this notice, the accompanying memorandum of points and authorities, the pleadings on file, the record in this matter, and any other argument that the Court deems appropriate for consideration.

RELIEF REQUESTED

As explained below, Rockstar respectfully submits that the Court should amend its Order to certify its ruling on personal jurisdiction for interlocutory review:

Apple Inc. is a resident of the Northern District of California, and one of five limited partners in Rockstar Consortium US LP. By contrast, both Rockstar Consortium US LP (a Delaware limited-liability partnership) and MobileStar Technologies LLC (its wholly owned subsidiary) are residents of the Eastern District of Texas. The Court held that Rockstar is subject to personal jurisdiction in the Northern District of California based on "continuing obligations" that Google alleged Rockstar owed to Apple and that those "obligations" flowed from Apple's alleged status as a "majority shareholder" able to exert "control" over Rockstar. While the Court found that these "obligations" related to Rockstar's patents and enforcement activities, it did not pierce Rockstar's corporate veil, did not find that Rockstar was the alter ego of Apple and did not find any obligation owed by Rockstar to Apple (or any other entity) to enforce Rockstar's patents *in this forum* (as opposed to *other jurisdictions*). In light of the forgoing, Rockstar respectfully asserts that reasonable jurists might disagree over whether the Court's Order, which reflects threshold legal questions related to the bounds of personal jurisdiction, is contrary to the controlling law. Therefore, the standard for certifying the Court's Order for interlocutory review is met, and the Court should exercise its discretion to certify its Order and the question below for interlocutory review.

The question presented is:

Whether Rockstar US LP, a Delaware limited partnership resident in the Eastern District of Texas is subject to personal jurisdiction in the Northern District of California, due to its alleged "continuing obligations" to Apple, one of its five limited partners, without (a) piercing the corporate veil or establishing that Rockstar is the "alter ego" of Apple; or (b) proving that any "continuing obligation" Rockstar is alleged to owe Apple (or another forum resident) relates to enforcing the patents-in-suit in the Northern District of California, not other forums.

Respectfully submitted,

Dated May 9, 2014.

By: */s/ Joshua W. Budwin*

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3), Defendants Rockstar Consortium US LP and MobileStar Technologies LLC (collectively, "Rockstar") respectfully move the Court to certify for interlocutory appeal its Order (Dkt. 58) denying Rockstar's motion to dismiss for lack of jurisdiction (Dkt. 19). The Court's Order resolved difficult, important legal questions related to the threshold question of personal jurisdiction. The Court's Order therefore presents a classic case for interlocutory review: if the Federal Circuit reaches a different conclusion, an immediate appeal of the Court's Order could dictate the outcome of this litigation and save the Court and the parties a substantial expenditure of time and resources. *See, e.g.*, *Microsoft Corp. v. DataTern, Inc.*, 2014 U.S. App. LEXIS 6219, at *18 (Fed. Cir. Apr. 4, 2014) (holding that the district court erred by denying a motion to dismiss as to one of the patents-in-suit and nullifying a non-infringement determination as to that patent). To mitigate this jurisdictional risk and conserve judicial and party resources, Rockstar respectfully requests that the Court certify its Order for interlocutory review. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 n.5 (9th Cir. 2011) (finding interlocutory review appropriate to avoid "unnecessary, protracted litigation," only to discover a jurisdictional defect upon final judgment).

This Court's Order resolved complex legal issues involving the threshold legal question of personal jurisdiction. In denying Rockstar's Motion, the Court found that Rockstar Consortium US LP, a Delaware limited partnership resident in the Eastern District of Texas (and by extension MobileStar Technologies LLC), was subject to specific jurisdiction in this forum. The Court found jurisdiction appropriate because Apple is a forum resident and Google alleged that Rockstar assumed "a substantial obligation to Apple related to the asserted patents." Order at 17 n.6. As the Court explained, "Google alleges that Apple is a majority shareholder of Defendants and exerts substantial control over them, and as a result Defendants are obliged to act on Apple's behalf." Order at 17. Thus, the Court held, Apple's alleged role as an influential "shareholder" in Rockstar was sufficient to "create[] continuing obligations" to a forum resident that make it reasonable to subject Rockstar to

suit in this forum. *Id.* at 19. In so holding, the Court specifically found that Rockstar's alleged obligation included "marshal[ing] the asserted patents." *Id*.

Importantly however, the Court did not pierce the corporate veil, did not find Rockstar to be the alter ego of Apple and did not find that Rockstar is "obliged" to Apple (or any other entity) to enforce or defend the patents-in-suit *in this forum*. *See generally id*. at 17-20. Indeed, the only "obligation" alleged by Google and found by the Court to be owed by Rockstar to Apple involving the patents-in-suit related to "Defendants' litigation strategy of suing Google's customers in the Halloween actions"—*in Texas*. *Id* at 19. Google did not offer, and the Court did not find, any "obligation" owed by Rockstar to Apple (or any other entity) to enforce or defend its patents in any California jurisdiction, including this one.

Accepting Google's pleaded allegations that the Court's factual findings rest on as true, Rockstar respectfully submits that reasonable jurists *might* disagree over whether, as a matter of controlling law, Rockstar is subject to personal jurisdiction in the Northern District of California. For this reason, and as explained below, each element of § 1292(b) is met and the Court should exercise its sound discretion in certifying its Order for interlocutory review.

First, Rockstar Consortium US LP is a Delaware limited partnership,[1] and Apple is one of five limited partners holding a minority interest.[2] According to Google, Apple was a "majority

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[1] As the Court recognized, Rockstar's general partner is Rockstar Consortium LLC. Dkt. 30 at 11-12; Order at 17. Google's Opposition to Rockstar's Motion, and the Court's Order, identified Kasim Alfahali, Ericsson's Chief Intellectual Property Officer, as the President of Rockstar Consortium LLC. *Id*. Mr. Alfahali works in the Eastern District of Texas at Ericsson's headquarters, which is across the street from Rockstar's Plano, Texas office. *See* Dkt. 57-1 at 1 n.2; *id.* at 2 n.3; *id*. at 9-10. However, Google's identification of Rockstar Consortium LLC's officers was incorrect. Rockstar Consortium LLC's CEO is John Veschi. Ex. 1 (identifying Rockstar Consortium LLC's officers).

[2] Google asserted that Apple is Rockstar's "majority shareholder," but that assertion is incorrect. *See, e.g.*, Dkt. 30 at 1 (Google referring to Apple as "majority owner"); *id*. at 11 (Google referring to Apple as "majority shareholder"); Order at 17 ("Google submits strong evidence that Apple is indeed the majority shareholder of Defendants based on Apple's majority investment in Rockstar's predecessor entity, Rockstar Bidco."). Rockstar Consortium US LP is a Delaware limited partnership made up of five limited partners, including Apple. Dkt. 19-6, Dean Dec. ¶ 35 (describing Apple as a "limited partner[]"); *see also* Dkt. 19 at 13-14. Although the concept of majority-minority is less relevant when discussing limited partnerships (as opposed to corporations), the record shows that

shareholder" that "exert[ed] substantial control over" Rockstar's decisions, "oblig[ing]" Rockstar "to act on Apple's behalf…to attack Google's Android platform." Even accepting such allegations as true—and they are not[3]—they fail as a matter of law to establish personal jurisdiction over Rockstar in the Northern District of California. A plaintiff must establish jurisdiction over the defendant *personally*, and the "corporate form is not . . . cast aside" unless a party can prove alter ego or pierce the corporate veil. *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1380-81 (Fed. Cir. 1998). Here, Google invited the Court to effectively pierce the corporate veil or find alter ego *without* actually piercing the corporate veil or finding alter ego. The Court's Order, following Google's urging, identified Apple's "shareholder" status with the alleged ability to "control" or influence the litigation decisions of Rockstar, to be a "substantial obligation" related to the patents that is sufficient to subject Rockstar to personal jurisdiction in Apple's home forum. *See* Order at 19, n.6 (veil piercing or alter ego not required, so long as a "substantial obligation to Apple related to the

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Apple's limited partnership interest in Rockstar Consortium US LP is in fact a minority interest. Dkt. 31-12 at 1 (article cited by Google and referenced in the Court's Order identifying Apple as one of five "minority" owners of Rockstar); Order at 18 (citing to Madigan Declaration Exhibit 12). As the Court correctly recognized, Apple contributed "$2.6 billion or fifty-eight percent of the $4.5 billion total investment in Rockstar Bidco." Order at 17-18. The Court's finding however that no "ownership interests changed, nor do Defendants assert otherwise" was not correct. *Id*. As the record reflected, while Apple contributed more money than the other limited partners in forming Rockstar Bidco LP, a number of the patents acquired by Rockstar Bidco LP were transferred directly to Apple. *See* Dkt. 31-14 (evidence cited by Google establishing that Rockstar Bidco LP assigned at least 1,147 U.S. patents to Apple); Dkt. 31-12 at 1 (Apple has a "minority" interest in Rockstar); Dkt. 19-6, Dean Dec. ¶ 35 (Apple is a "limited partner" of Rockstar). And, as a result of the direct assignment of these 1,147 patents to Apple from Rockstar Bidco, when Rockstar Consortium US LP was formed, Apple became one of five limited partners in Rockstar Consortium US LP, with a minority ownership interest. *Id*.

[3] Dkt. 31-12 at 5 (article cited by Google and referenced in the Court's Order identifying Apple and Rockstar as having an "arms-length" relationship); *id.* at 4 (same article explaining that Rockstar's partners "cannot pick and choose who we will target"); Order at 18 (citing Madigan Declaration Exhibit 12); Dkt. 19-6, Dean Dec. ¶ 35 (confirming that Apple "neither direct[s] nor control[s] Rockstar's licensing efforts"). Dkt. 31-29 (article cited by Google reiterating that "[Rockstar] [C]onsortium, not the shareholder companies, ma[k]e the decision to sue").

asserted patents" is shown). This finding impermissibly sweeps aside Rockstar's corporate form as a Delaware limited partnership, without engaging in veil-piercing or establishing alter ego.[4]

Second, under Federal Circuit law, it was not enough for Google to allege, and the Court to find, that Rockstar had general "obligations" to Apple to enforce the patents-in-suit. Rather, and because Rockstar is a foreign defendant, Google had to allege and the Court had to find Rockstar owed Apple (or another entity) an enforcement obligation *in the forum*. Unless the obligation involves "enforcement efforts *in the forum*," it is insufficient as a matter of controlling law to subject a foreign defendant to personal jurisdiction. *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1019-20 (Fed. Cir. 2009) (emphasis added). Thus, even if Google had identified a proper "obligation" alleged to be owed by Rockstar to Apple (separate and apart from Apple's status as a limited partner), Google's inability to identify any obligation related to enforcement activity *in this forum*, establishes that personal jurisdiction over Rockstar is improper here. Moreover, the type of "obligations" that Google alleged Rockstar owed Apple, and that the Court discussed in its Order—*e.g.*, updating Rockstar's limited partners on "progress" and telling them that "work is being done"[5]—are not the type of "obligations" that subject non-resident to jurisdiction in a foreign forum. *See Autogenomics*, 566 F.3d at 1019-20; Del. Code Ann. tit. § 17-303 (2014).

In light of these issues, Rockstar respectfully submits that § 1292(b) certification is warranted: (1) the Court's Order involves "a controlling question of law"—legal issues related to the

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[4] This finding is especially troubling here, because under the Delaware limited liability partnership statute that Rockstar US LP is organized under, a limited partner may permissibly "act . . . [to] cause a general partner or any other person to take . . . *any action*" without being found to direct or control the limited partnership. Del. Code Ann. tit. § 17-303 (2014) (emphasis added) (also setting forth other permissible activities that a limited partner can engage in without being found to direct or control the limited partnership). Even if Apple could influence Rockstar's decision to litigate, and even if Rockstar owed Apple a "substantial obligation" related to the patents-in-suit, there has been no showing or allegation that, under the Delaware limited partnership statute, Apple exerted "control" over Rockstar to such an extent that Apple could not be considered a limited partner.

[5] Order at 18 (referring to "progress" reports, updates about "real work…being done," and references to "periodic calls and meetings with the owners"; noting that "it does appear telling that Veschi speaks directly and periodically with owners' intellectual property departments to demonstrate that 'work is being done,'" even though "they avoid talking about the details").

dispositive principles for a proper jurisdictional analysis; (2) there is a "substantial ground for difference of opinion" regarding how these legal issues should be resolved; and (3) an "immediate appeal" may "materially advance the ultimate termination of the litigation," while mitigating the risk of letting this case run its normal course, only to have these issues resolved on appeal, which may result in the waste of party and judicial resources because a reversal would end the entire case. 28 U.S.C. § 1292(b); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (listing the certification requirements). Rockstar requests that the Court amend and reissue its Order to include a statement certifying this matter for interlocutory review. *See* Fed. R. App. P. 5(a)(3).

ARGUMENT

Under 28 U.S.C. § 1292(b), the Court has discretion to certify to the Federal Circuit an otherwise non-appealable order if: (1) the "order involves a controlling question of law"; (2) there is "substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." All of § 1292(b)'s requirements are met, and an immediate appeal is appropriate.

I. The Court's Order Presents A Controlling Question Of Law

Section 1292(b) requires that the Court's Order involve a "controlling question of law," a requirement satisfied here. A question is "controlling" where its resolution could "materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026 (citing *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966)). "Of course, if resolution of the question being challenged on appeal will *terminate* the action in the district court, it is clearly controlling." 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 203.31[2] (3d ed. 1997) (emphasis added). The threshold question of personal jurisdiction fits comfortably within this requirement. *Id.*

Personal jurisdiction is a "threshold" issue—it is "essential" to the Court's authority, and the Court is "'powerless to proceed'" without it. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999). If the Court lacks jurisdiction over Rockstar, the entire suit must be dismissed, ending the

litigation immediately. This is exactly the kind of "controlling" issue that Congress contemplated for § 1292(b): it permits immediate review of an issue that "could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996).[6]

II. There Are Substantial Grounds For Reasonable Jurists To Reach Different Conclusions On These Important Legal Issues

Respectfully, the Court's disposition of Rockstar's personal jurisdiction defense is subject to a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). These are legal issues "over which reasonable judges *might* differ," and uncertainty "provides a credible basis for a difference of

[6] For this reason, courts have repeatedly certified orders under § 1292(b) where questions of personal jurisdiction are implicated. *See, e.g., Nuovo Pignone, SPA v. Storman Asia M/V*, 310 F.3d 374, 378 (5th Cir. 2002) ("In its order denying the motion to dismiss, the district court, on [defendant's] motion, certified" the issue of "personal jurisdiction" for § 1292(b) "interlocutory appeal."); *see also GTE New Media Serv. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1345 (D.C. Cir. 2000) (accepting § 1292(b) appeal asking "whether the District Court may assert personal jurisdiction over the defendants"); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 239 (2d Cir. 1999) (accepting § 1292(b) appeal certified by district court after denying motion to dismiss "for lack of personal jurisdiction"); *In re Pintlar Corp. (Goodson v. Rowland)*, 133 F.3d 1141, 1143 (9th Cir. 1997) ("The district court certified its order [regarding personal jurisdiction] for interlocutory appeal and we granted…permission to appeal under 28 U.S.C. § 1292(b)."); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir. 1997) (After the district court held "it had personal jurisdiction," both the district court and the circuit "granted leave to defendants to file an interlocutory appeal under 28 U.S.C. § 1292(b)."); *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 454 (10th Cir. 1996) (granting request for "leave to appeal the district court's denial of [the court's] motion to dismiss for lack of personal jurisdiction"); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1240 (7th Cir. 1990) (granting "application" to certify denial of motion to dismiss for lack of personal jurisdiction, among other issues); *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 461 (1st Cir. 1990) (certifying "refus[al] to dismiss the case for want of personal jurisdiction," because the order "'involve[d] a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal…might materially advance the ultimate termination of the litigation'"); *Radaszewski v. Contrux, Inc.*, 891 F.2d 672, 673 (8th Cir. 1989) (certifying personal-jurisdiction issue because "an immediate appeal might materially advance the ultimate termination of the litigation"); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1407-08 (9th Cir. 1989) (certification asking "whether it was error for the district court to exercise personal jurisdiction"); *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 44 (3d Cir. 1985) (At defendant's request, an order denying motion to dismiss "for lack of personal jurisdiction" was certified for § 1292(b) review.); *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1269 (9th Cir. 1981) (Defendant "secured permission to appeal, pursuant to 28 U.S.C. § 1292(b), from the district court's denial of a motion to dismiss" for lack of "personal jurisdiction.").

opinion." *Reese*, 643 F.3d at 688 (emphasis added). While Rockstar believes the Court's Order is at odds with controlling law, the issues are (at a minimum) "novel and difficult"—and this factor is satisfied "where reasonable jurists *might* disagree on an issue's resolution, not merely where they have already disagreed." *Id.* (emphasis added).

A. Reasonable Jurists Might Disagree Over Whether A Limited Partnership Is Subject To Personal Jurisdiction In A Limited Partner's Home Forum Without Proving Alter Ego Or Veil-Piercing

The Court found that Rockstar's "substantial" and "continuing obligations" to Apple "related to the asserted patents" and subjected Rockstar to jurisdiction in California—Apple's home forum. Order at 17 n.2. The Court determined that veil piercing or finding alter ego was not required because "Defendants have undertaken a substantial obligation to Apple related to the asserted patents . . . " *Id*. The Court also found that Apple had the ability to "exert[] substantial control over" Rockstar. *Id*. at 17.

Rockstar is unaware of *any* controlling authority which stands for the proposition that—absent veil piercing or finding alter ego—alleged "obligations" owed by a limited partnership to its limited partners (or a limited partner's ability to "exert control" or influence over the partnership's decisions) subjects the limited partnership to personal jurisdiction in the limited partner's home forum (unless, and as discussed below, those obligations can be shown to extend to enforcement actions in the forum). *See, e.g., Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) (each corporate entity is a separate person with its own identity). As a general matter, a corporation or limited partnership is not subject to suit where its shareholders or partners reside. *Walden v. Fiore*, 134 S. Ct. 1115,1122 (2014). On the contrary, "the general rule [is] that the corporate entity should be recognized and upheld." *3D Sys.*, 160 F.3d at 1380. To avoid subjecting a limited partnership or corporation to suit in each jurisdiction where a limited partner or shareholder resides, the law requires that a plaintiff must establish jurisdiction over the defendant *personally*, and that the "corporate form is not…cast aside" unless a party can prove alter ego or pierce the corporate veil. *Id.* at 1380-81. In the limited-partnership context, and under Delaware law,

a limited partner may permissibly "act…[to] cause a general partner or any other person to take…*any action*" without being found to direct or control the limited partnership. Del. Code Ann. tit. § 17-303 (2014) (emphasis added).

Even if Rockstar owed "substantial" and "continuing obligations" to its limited partners (including Apple), and even if Apple could exert some modicum of "control" over Rockstar's litigation decisions, under settled law courts should not look past the legal form without proving alter ego or veil piercing. Every case Google cited in its opposition to Rockstar's Motion—and every case relied upon in the Court's Order—involved non-resident entities who engaged with *independent* third parties *in the forum* to undertake enforcement activities *in the forum* where personal jurisdiction was upheld. Dkt. 34; Order at 16 n.5; *id*. at 16-18. Rockstar did not reach out and identify Apple (or another forum resident) to participate in patent enforcement or defense in California. Rather, it simply operated as any typical limited partnership with limited partners spread around the country, and did so with a normal level of interaction between the limited partnership and the limited partners. Dkt. 31-12 at 5 (article cited by Google and referenced in the Court's Order identifying Apple and Rockstar as having an "arms-length" relationship); *id*. at 4 (explaining that Rockstar's partners "cannot pick and choose who we will target"); Order at 18 (citing Madigan Declaration Exhibit 12); Dkt. 19-6, Dean Dec. ¶ 35 (confirming that Apple "neither direct[s] nor control[s] Rockstar's licensing efforts"). Dkt. 31-29 (article cited by Google reiterating that "[Rockstar] [C]onsortium, not the shareholder companies, ma[k]e the decision to sue").

Accordingly, the types of "continuing" and "substantial obligations" that the Court identified are the type of normal obligations that any limited partnership or corporation normally owes its limited partners or shareholders. Order at 18 (referring to "progress" reports, updates about "real work…being done," and references to "periodic calls and meetings with the owners"; noting that "it does appear telling that Veschi speaks directly and periodically with owners' intellectual property departments to demonstrate that 'work is being done,'" even though "they avoid talking about the details"). No authority stands for the proposition that—absent veil piercing or finding alter ego (or a

finding of enforcement actions in the forum)—updating a limited partner or a shareholder as to the ongoing activities of the limited partnership or corporation subjects the limited partnership or corporation to personal jurisdiction where the limited partner or shareholder resides. *Walden*, 134 S. Ct. at 1122. Similarly, no authority stands for the proposition that—absent veil piercing or finding alter ego (or a finding of enforcement actions in the forum)—the alleged ability of a limited partner or shareholder to "exert[] substantial control over" a limited partnership or corporation subjects the limited partnership or corporation to personal jurisdiction where the limited partner or shareholder resides. *3D Sys.*, 160 F.3d at 1380. This is especially true where, as here, the alleged action of the limited partner falls squarely within the scope of activities that Delaware law permits limited partners to take. Del. C. § 17-303 (among other activities, a limited partner may "act…[to] cause a general partner or any other person to take…any action" without being found to direct or control the limited partnership).

In the end, the only activity that Google alleged Rockstar "directed" at California was the fact that Rockstar Consortium US LP has Apple—one of five limited partners—resident in California and that Rockstar owed "obligations" to Apple *not* related to enforcement activities in the forum. Google thus invited (without directly asking) the Court to ignore the legal formation of Rockstar Consortium US LP as a Delaware limited partnership resident in the Eastern District of Texas. This departs from settled law, downplays the importance of Rockstar's legal form, conflicts with the Delaware limited partnership statute, and unduly expands the jurisdictional reach over all limited partnerships and corporations to encompass any forum where limited partners or shareholders may reside, so long that the partnership or corporation can be said to owe some substantial "obligation" to the limited partner or shareholder, unrelated to enforcement activities in the forum. *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001).

B. Reasonable Jurists Might Doubt That A Limited Partnership's "Obligations" To Enforce Patents In *Other* Jurisdictions Gives Rise To Personal Jurisdiction In *This* Jurisdiction

Under Federal Circuit law, to establish specific jurisdiction, it is insufficient to identify an "obligation" to enforce the relevant patents *unless* that obligation extends to "enforcement efforts *in the forum*." *Autogenomics*, 566 F.3d at 1019-20 (emphasis added). Jurisdiction exists "where such 'other activities' in some identifiable way 'relate to' enforcement of those patents *in the forum*." *Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1334 (Fed. Cir. 2008) (emphasis added); *see id*. (stating that "'other activities' include initiating judicial or extrajudicial patent enforcement *within the forum*") (emphasis added); *Radio Sys. Corp. v. Accession, Inc.*, 638 F.3d 785, 792 (Fed. Cir. 2011) ("We made clear in *Avocent* that enforcement activities taking place outside the forum state do not give rise to personal jurisdiction in the form, and that decision is controlling here.").

Here, at most, Google has alleged, and the Court has found, that Apple resides in California, and may benefit from Rockstar's enforcement activities *in other forums* (such as the Eastern District of Texas, Rockstar's home forum). Google has not identified, nor has the Court found, any "continuing obligation" owed by Rockstar to Apple related to any enforcement activity *in this forum*.[7] However, under Federal Circuit law, the "continuing obligations" *must* relate to the enforcement of the patents-in-suit *in the forum* where personal jurisdiction is sought. *Avocent*, 552 F.3d at 1334; *Radio Sys.*, 638 F.3d at 792. Accordingly, absent veil piercing, a finding of alter ego,

[7] The Court's Order also noted that "Defendants' litigation strategy of suing Google's customers in the Halloween actions"—*in Texas*—"is consistent with Apple's particular business interests." Order at 19. Even if Rockstar's enforcement activity in other forums is "consistent" with a resident shareholder's "business interests," this does not justify subjecting Rockstar to suit in the shareholder's home forum in the absence of veil piercing or finding alter ego, especially when the enforcement activity in other forums would also be "consistent" with those "particular business interests." There is "no precedent that holds that the filing of a suit in a particular state subjects that party to specific personal jurisdiction everywhere else." *Avocent*, 552 F.3d at 1339. If Google wishes to use Rockstar's alleged "obligations" to limited partner Apple as a basis for grounding jurisdiction against Rockstar in California, it must identify "an exclusive license or other obligation *relating to the exploitation of the patent by such licensee or contracting party in the forum*," not in other forums. *Id.* (emphasis added).

or a showing that Rockstar has undertaken or owes Apple obligations to enforce the patents-in-suit in California, Rockstar cannot be subject to personal jurisdiction here.[8]

III. An Immediate Appeal May Advance The Ultimate Termination Of This Litigation

Finally, an immediate appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Rockstar is seeking review at the very outset of the proceeding (indeed before the case management conference, presently scheduled for May 14, 2014), long before substantial judicial and party resources are devoted to the case. If the Court lacks jurisdiction over Rockstar, it is pointless to await months or years of "unnecessary, protracted litigation," only to discover upon final judgment that there was never jurisdiction in the first place. *Reese*, 643 F.3d at 688 n.5. Immediate review here thus satisfies one of Congress's core objectives in § 1292(b): avoiding the potential waste of judicial and party resources by litigating a large and complex case to conclusion in a court without jurisdiction. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026 (Section 1292(b) review is appropriate when "allowing an interlocutory appeal would avoid protracted and expensive litigation.").

In addition, "several district courts…have opined that certification may be particularly appropriate in complex litigation involving multiple coordinated actions." *Fed. Hous. Fin. Agency v. UBS Ams., Inc.*, 858 F. Supp. 2d 306, 338 (S.D.N.Y. 2012). While Google wishes to use this matter as an anchor for dislodging all six suits from the Eastern District of Texas and transporting that

[8] The Court's Order also asserts that Rockstar engaged in a "'scare the customer and run' tactic" to "advance[] Apple's interest in interfering with Google's Android business." Order at 19 (citing *Campbell Pet Co. v. Miale*, 542 F.3d 879, 887 (Fed. Cir. 2008)). Respectfully, Rockstar did not engage in scare-and-run tactics. On the contrary, Rockstar did not "run" at all—it sued major infringers (not small mom and pop operations) for their independent conduct in the Eastern District of Texas where it resides, where Samsung (one of the Texas defendants resides) and it is prosecuting those suits with vigor. Moreover, *Campbell* did not "find[] jurisdiction where the patentee 'took steps to interfere with the plaintiff's business.'" Order at 19 (quoting *Campbell*, 542 F.3d at 887). Rather, *Campbell* upheld jurisdiction because those "steps" constituted extra-judicial enforcement *in the forum* where personal jurisdiction was found. *See Autogenomics*, 566 F.3d at 1020 ("In *Campbell Pet*, where the court held personal jurisdiction existed, the patentee had enlisted a third party to remove the defendant's products from a trade show that was being held in the forum state—*enforcement efforts in the forum*.") (emphasis added).

litigation here, and while this Court has found that this case is first-filed under the customer-suit exception to the first-filed rule, it makes little sense for this case to advance until it is clear that the threshold personal jurisdiction question is satisfied. If the Texas actions are stayed or transferred in deference to this action (*see* Order at 26), the disposition of *all* cases could be substantially affected or delayed if this case is ultimately found to suffer from a fatal jurisdictional defect. "Courts may properly consider such 'system-wide costs and benefits' in determining whether to permit interlocutory review." *UBS Ams.*, 858 F. Supp. 2d at 338 (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 921 F.2d 21 (2d Cir. 1990)). Conversely, and because no defendant in Texas has disputed personal jurisdiction, no similar threshold jurisdictional risk underlies Rockstar's Texas cases.

CONCLUSION

Rockstar respectfully requests that this Court amend its Order under Fed. R. App. P. 5(a)(3) and certify these important questions for interlocutory appeal under 28 U.S.C. § 1292(b).

Respectfully submitted,

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By: /s/ *Joshua W. Budwin* _____

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