**Courtland L. Reichman (SBN 268873)**
**creichman@mckoolsmithhennigan.com**
**McKool Smith Hennigan, P.C.**
**255 Shoreline Drive Suite 510**
**Redwood Shores, CA 94065**
**(650) 394-1400**
**(650) 394-1422 (facsimile)**

**ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE**

**Attorneys for Defendants Rockstar Consortium US LP and MobileStar Technologies LLC**

**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' REPLY IN SUPPORT OF MOTION FOR § 1292(b) CERTIFICATION FOR INTERLOCUTORY REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES**

Date: Thursday, June 19, 2014
Time: 2:00 p.m.
Courtroom:

Courtroom 2, Fourth Floor
Judge: Hon. Claudia Wilken

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## INTRODUCTION

Google's Opposition is is divorced from the law of the Federal Circuit regarding personal jurisdiction. As it relates to the personal jurisdiction issues raised in Rockstar's Motion, there are two ways Rockstar US LP (hereinafter "Rockstar")—a Delaware limited liability partnership resident in Texas (and, by association MobileStar Technologies, LLC, its subsidiary)—could be subject to personal jurisdiction in the NDCA.

First, Rockstar could be subject to personal jurisdiction in the NDCA if it was found to be the alter ego or agent of Apple, a forum resident. While Google makes various statements suggesting that Rockstar is in effect Apple's proxy in a "thermonuclear war" against Android, the statements Google points to were made by Apple and not Rockstar.[1] Rockstar is *not* Apple, it is a legally separate limited liability partnership organized under the state laws of Delaware. Google has not alleged, and the Court has not found, that Rockstar is the agent or alter ego of Apple. Google provides no other justification or reason to attribute any statement by Apple to Rockstar. Therefore, in the absence of alter ego or veil piercing, Apple's statements are irrelevant to whether Rockstar is subject to personal jurisdiction in the Northern District of California ("NDCA").

Second, even if not the agent or alter ego of Apple, Rockstar could be subject to personal jurisdiction in the NDCA if it owed "continuing obligations" to Apple (or another forum resident), which are sufficient under controlling Federal Circuit law to subject Rockstar to personal jurisdiction in the NDCA. The crux of the issue is whether, Rockstar owes "obligations" to Apple (or another forum resident) of the type found sufficient by the Federal Circuit to subject an entity to personal jurisdiction in a foreign forum. The answer to this controlling question of law is no. No Federal Circuit case, including *Avocent*—which Google's Opposition hangs its proverbial hat on—has held an entity subject to personal jurisdiction in a foreign forum absent a showing of "continuing

[1] In an apparent nuclear détente, on May 16, 2014 Google and Apple announced an end to their patent hostility. *See* "Apple, Google settle smartphone patent litigation" available at *http://www.reuters.com/article/2014/05/17/us-apple-google-settlement-idUSBREA4F0S020140517* (last accessed on May 28, 2014).

obligations" that relate to *enforcement of the patents in the forum* where jurisdiction is sought. Nor has any Federal Circuit authority, absent veil piercing or a finding of alter ego (which Google concedes is not at issue here), held a foreign defendant subject to personal jurisdiction in a forum where an alleged-to-be influential shareholder or limited partner resides. This is because any other rule sweeps aside the corporate form, sets aside the careful balance created in the controlling Federal Circuit authority, and would subject any foreign entity to suit in any jurisdiction where any alleged-to-be influential shareholder or partner resides.

Each of the three requirements for interlocutory review is satisfied here. First, whether Rockstar is subject to personal jurisdiction in the NDCA involves a controlling question of Federal Circuit law. Google does not suggest otherwise. Second, whether Rockstar can be subject to personal jurisdiction in the NDCA due to "continuing obligations" it is alleged to owe Apple is subject to substantial ground for difference of opinion among reasonable jurists. As explained herein, both Google and the Court's Order broaden the scope of personal jurisdiction under the controlling Federal Circuit precedent. None of the "continuing obligations" alleged by Google, or found by the Court, relate to *enforcement of the patents in the forum* and therefore are not the type of obligations that the Federal Circuit has held subjects a non-resident entity to personal jurisdiction in a foreign forum. Third, the interlocutory review will undisputedly advance the ultimate determination of this litigation. If the Federal Circuit were to reach a contrary decision, this case would be dismissed and this litigation would terminate.

In light of the foregoing, the Court should exercise its sound discretion by certifying for interlocutory review the question presented in Rockstar's Motion together with the Court's Order denying Rockstar's Motion to Dismiss.

## 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. Google Does Not Dispute That The Court's Order Denying Rockstar's Motion To Dismiss Presents A Controlling Question Of Law.

Rockstar's Motion explained that because personal jurisdiction is a threshold issue essential to the Court's authority, the Court's Order denying Rockstar's Motion to Dismiss presented a controlling question of law. (Docket No. 66 at 5-6). Google ducks this issue, merely asserting in conclusory fashion that the Court "need not decide this issue." (Docket No. 71 at 12-13). Accordingly, there is no material dispute—the Court's Order presents a controlling question of law.

## II. There Is Substantial Ground For Difference Of Opinion Among Reasonable Jurists As To Whether Rockstar Is Subject To Personal Jurisdiction In The NDCA.

The relevant standard in the Ninth Circuit to determine if there is a substantial ground for difference of opinion in the context of Section 1292(b) is whether or not "reasonable jurists *might* disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (emphasis added). Google attempts to spin the standard advanced by the Ninth Circuit in *Reese* by citing two unpublished district court decisions from earlier in 2011 (pre-*Reese*) for the proposition that Rockstar "must demonstrate an 'established split of authority among the circuits' or 'clearly conflicting decisions by the Ninth Circuit' or other controlling circuit (here, the Federal Circuit), 'which merit a departure from the general rule that only final judgments are appealable.'" (Docket No. 66 at 5). However, as the Ninth Circuit explained in *Reese*, "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688. In the Ninth Circuit, there is no requirement, as Google postulates, to show a "split" of authority between circuits or "clearly conflicting decisions" within a circuit, to warrant certification.

While Google asserts that "strong disagreement with the court's ruling" by itself fails to meet the certification standard, Rockstar's request goes beyond its disagreement with the Court's Order.

Indeed, every request under Section 1292(b), including the request granted in *Reese* (where the Ninth Circuit reversed a district court's order denying in-part a motion to dismiss for failure to state a claim), is predicated upon some disagreement with a court order. *See Reese*, 643 F.3d at 688. Rockstar's Motion asserts that the Court's Order denying its Motion to Dismiss impermissibly broadens the scope of personal jurisdiction under the controlling law of the Federal Circuit, such that other judges or a panel of the Federal Circuit might reasonably disagree with the Court's holding. This is precisely the type of issue the Ninth Circuit determined in *Reese* was proper for certification.

Rockstar's Motion presents a novel issue of first impression appropriate for interlocutory review because no court (including the Federal Circuit) has ever held a non-resident entity subject to personal jurisdiction in a foreign forum on facts similar to those presented here: no veil piercing or alter ego; the presence of one limited partner with a minority ownership interest in the forum; no exclusive licensee in the forum; no allegation of judicial or extra-judicial enforcement activities in the forum; but assertions that the one in forum limited partner exerts control or influence over the non-resident limited partnership that was found to be subject to personal jurisdiction in the forum. Surely, if an analogous factual situation existed, Google would have located it and brought it to the Court's attention. Because the Court's Order effectively broadens the scope of personal jurisdiction beyond the scope of the controlling law, it is appropriate for interlocutory review.

### A. Google Concedes That It Has Not Alleged Veil Piercing Or Alter Ego, Nor Has The Court Made Such A Finding.

In its Motion, Rockstar cited various authorities in support of the "general rule" that the corporate form is to be "respected" and not "swept aside" absent veil piercing or a finding of alter ego. (*See* Docket 66 at 3, 7-9). Google does not take serious issue with these authorities, instead conceding that it is not asserting that "alter ego or agency theories are at issue." (Docket 71 at 5-6).

Rockstar's Motion did not assert that Google alleged alter ego or veil piercing (or that the Court found them). (*See* Docket 66 at 2 ("[i]mportantly however, the Court did not pierce the corporate veil, did not find Rockstar to be the alter ego of Apple . . ."); *id*. at 3-4; *id.* at 7 ("[t]he

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 . . .'"). Rather, Rockstar pointed out that *if* Google could establish either veil piercing or alter ego, Rockstar would likely be subject to personal jurisdiction in the NDCA. (*Id*. at 7-8). However, it remains true—and undisputed—that "under settled law courts should not look past the legal form without proving alter ego or veil piercing." (*Id*. at 7).

Here, the *absence* of a finding or allegation of veil piercing or alter ego is important for two reasons. First, it forecloses one of the two ways that Rockstar could be subject to personal jurisdiction in the NDCA on the facts presented. Second, it shows that Google's hyperbole about Apple (not Rockstar) wanting to start a now-settled (*see fn.* 1, *supra*) "thermonuclear war" against Google (and other such statements made by Apple, not Rockstar) is irrelevant to whether Rockstar, a legally separate limited liability partnership organized under the state laws of Delaware and resident in Texas, is subject to personal jurisdiction in the NDCA.[2] Google admits that Rockstar is not the agent or alter ego of Apple and provides no other reason to attribute statements made by Apple to Rockstar. As such, Rockstar can only be subject to personal jurisdiction in the NDCA based upon a showing of "obligations" owed by Rockstar to Apple that are sufficient, under controlling Federal Circuit law, to subject Rockstar to personal jurisdiction in the NDCA. (*See* Docket 66 at 7; Docket 71 at 5-6).

**B. No Authority From The Federal Circuit—Including *Avocent*—Holds An Entity Subject To Personal Jurisdiction In A Foreign Forum Absent A Showing Of Enforcement "Obligations" Related To The Patents-In-Suit *In The Forum*.**

Google's Opposition asserts that "the Court merely applied existing black-letter law, holding that personal jurisdiction can arise from an 'undertaking which imposes enforcement obligations with a party residing or regularly doing business in the forum.'" (Docket 71 at 6 (Google citing Court's Order which in turn cites *Avocent* for this proposition); *id.* at 8 (Google repeating this same

[2]Indeed, if Apple were truly "pulling the strings" as Google alleges, then the parties should be obligated to end this litigation as well.

line from *Avocent*); *id.* at 9 (same); *see also* Docket No. 58 at 15-16, 20 (Court's Order discussing this portion of *Avocent*)). As confirmed by *Avocent* itself, and the later Federal Circuit cases of *Radio Sys. Corp.* and *Autogenomics*, Google's Opposition—like the Court's Order—reads this one line from the Federal Circuit's *Avocent* opinion too broadly. For this reason, other judges or a panel of the Federal Circuit might reasonably disagree with the Court's holding which effectively broadens the scope of personal jurisdiction beyond the boundaries of controlling Federal Circuit authority set forth in *Avocent*, *Radio Sys. Corp.* and *Autogenomics* as discussed below and in Rockstar's Motion.

*Avocent* holds that the alleged "enforcement obligations" must relate to *enforcement of the patents-in-suit in the forum* where jurisdiction is sought. *Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1334 (Fed. Cir. 2008). It is *not* enough to show or allege that a foreign defendant owes obligations to a forum resident to enforce the patents-in-suit outside the forum. *Radio Sys. Corp. v. Accession, Inc.*, 638 F.3d 785, 792 (Fed. Cir. 2011) (emphasis added) ("We made clear in *Avocent* that *enforcement activities taking place outside the forum state do not give rise to personal jurisdiction in the forum*, and that decision is controlling here.")[3]

Discussing what "other activities" may subject a foreign entity to personal jurisdiction in a foreign forum, the *Avocent* panel stated:

> Because declaratory judgment actions raise non-infringement, invalidity, and/or unenforceability issues central to enforcement of the patents in question, we have looked beyond the 'arises out of' inquiry and have found jurisdiction where such 'other activities' in some identifiable way 'relate to' *enforcement of those patents in the forum*.

*Avocent*, 552 F.3d at 1334 (emphasis added). The *Avocent* panel then summarized its reasoning by stating:

> [B]ased on our precedent, as discussed supra, if the defendant patentee purposefully directs activities at the forum which relate in some material way to the enforcement or the defense of the patent, those activities may suffice to support specific jurisdiction. For example, when the patentee enters into an exclusive license or other obligation relating to the exploitation of the patent by such licensee or contracting party in the forum, the patentee's contractual

[3]As explained in Defendants' Motion, Defendants *do not* owe any enforcement obligation to Apple, or any other limited partner, in any forum. (Docket No. 66 at 2-4; *id*. at 10-11).

> undertaking may impose certain obligations to enforce the patent against infringers. By such conduct, the patentee may be said to purposefully avail itself of the forum and to engage in activity that relates to the validity and enforceability of the patent.

*Id*. at 1336. As the *Avocent* opinion makes clear, the "continuing" or "other obligations" sufficient to subject a non-resident entity to personal jurisdiction in a foreign forum must, "in some identifiable way 'relate to' *enforcement of those patents in the forum*." *Id*. at 1334 (emphasis added). Said another way, such "other obligations" must "relat[e] to the exploitation of the patent by such licensee or contracting party *in the forum*." *Id*. at 1336 (emphasis added). No allegation that Rockstar owed Apple (or any other forum resident) any obligation to enforce or exploit any of the patents-in-suit in the NDCA was alleged by Google or found by the Court.[4]

Sandwiched between the paragraphs quoted above, is the one line of the *Avocent* opinion that Google refers to as "black-letter law." (Docket 71 at 6). Throughout its opposition, Google ignores the portions of *Avocent* quoted above, and instead selectively focuses only on the panel's reference to "other undertaking[s] which imposes enforcement obligations with a party residing or regularly doing business in the forum." (*Id.*; *see also id.* at 1, 7-9). Google uses this one line from *Avocent* time and again as the "hook" for personal jurisdiction in this case. (*Id.*) The Court's Order also reads this one line from *Avocent* broadly. (Docket No. at 15-16, 20 (Court's Order discussing this portion of *Avocent*)). However, in addition to the portions of *Avocent* quoted above, immediately following this line, the *Avocent* panel includes cites to other Federal Circuit cases with parentheticals which explain the factual scenarios where "other obligations" have been deemed sufficient to subject an

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[4] *Radio Sys. Corp*., 638 F.3d at 792 ("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."). Therefore, any alleged enforcement obligation in Texas (which, Rockstar asserts does not exist, *see fn.* 3, *supra*), is irrelevant to whether Rockstar is subject to personal jurisdiction in the NDCA. *See also Avocent*, 552 F.3d at 1339 ("We are aware of no precedent that holds that the filing of a suit in a particular state subjects that party to specific personal jurisdiction everywhere else"); *Juniper Networks, Inc. v. SSL Servs., LLC*, Case No. 08-cv-5758, 2009 U.S. Dist. LEXIS 112399, *11-12 (N.D. Cal. Nov. 16, 2009), *aff'd* 2010 U.S. App. LEXIS 25498 (Fed. Cir. Dec. 13, 2010) (suing a California entity in Texas is insufficient to confer specific jurisdiction in California).

non-resident entity to jurisdiction in a foreign forum. *Avocent*, 552 F.3d at 1334-1335. These factual scenarios include:

- enlisting a third party to assist in extra-judicial patent enforcement activities in the forum by removing alleged infringing products from a trade show being held in the forum;
- entering into exclusive license agreements with entities who transact business in the forum;
- entering into exclusive license agreements with forum residents;
- the prior grant of an exclusive license to the plaintiff, a forum resident;
- substantial contacts with an exclusive licensee and forum resident;
- contract with an exclusive distributor to sell the patented products in the forum, where the agreement required patent enforcement and was analogous to a grant of an exclusive license;
- filing of suit against other parties, on the patents in question, in the forum;
- grant of an exclusive license to the patent to entity who competes with forum-resident plaintiff, including the obligation to defend and pursue any infringement against the patent.

*Id.* (citations and internal quotations omitted). (*See also* Docket No. 58 at 16, n. 5). The *Avocent* panel also explained that certain types of "other activities," including "mere sales within the forum" of products covered by the patents and "a patentee with thirty-four non-exclusive licensees selling the patented product in the forum state" are insufficient to establish personal jurisdiction. *Avocent*, 552 F.3d at 1336. *Avocent* further makes clear that alleged harm to a company's reputation or customer relationships is insufficient to create personal jurisdiction in the forum where the alleged-to-be-harmed company resides. *See Avocent*, 552 F.3d at 1340 (rejecting plaintiff's argument that patentees' infringement letters sent to a third-party retailer provided specific jurisdiction because "the intended effect was to slow the sale of plaintiff's allegedly infringing products").

Here, no fact or allegation analogous to any of the personal jurisdiction scenarios set forth in *Avocent*, or any other controlling authority, was alleged by Google or found by the Court in its Order. Viewed in the light most favorable to Google, Google's allegations amount to the assertion that Rockstar owes "obligations" to Apple as an NDCA resident to enforce the patents-in-suit in

Texas; that Apple benefits from Rockstar's lawsuits in Texas; and that by enforcing its patents in Texas, Rockstar may have caused harm to Google's business relationships with the Texas defendants. (Docket 66 at 2; Docket 71 at 2-3 (Google's bullet-point list of alleged "continuing obligations" owed by Rockstar to Apple – *none* of which relate to enforcement of the patents-in-suit in the NDCA)). However, consistent with the foregoing discussion of *Avocent*, such allegations (even if true, which they are not), are insufficient as a matter of law under controlling Federal Circuit precedent to subject Rockstar to personal jurisdiction in the NDCA. *Avocent*, 552 F.3d at 1336, 1340. *Radio Sys. Corp.*, 638 F.3d at 792 (emphasis added) ("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."); *Avocent*, 552 F.3d at 1340 (rejecting plaintiff's argument that patentees' infringement letters sent to a third-party retailer provided specific jurisdiction because "the intended effect was to slow the sale of plaintiff's allegedly infringing products"); *see also fn.* 4, *supra*. Despite being cited and discussed in Rockstar's Motion, Google's Opposition is *entirely silent* regarding *Radio Sys. Corp.*—a case that is fatal to Google's personal jurisdiction assertions.

Google attempts to save face by citing to the Federal Circuit's decision in *Autogenomics.* (Docket 71 at 9). In *Autogenomics* the district court and the Federal Circuit each held that the non-resident defendant *was not* subject to personal jurisdiction in the forum. *Autogenomics, Inc. v. Oxford Gene Technology Ltd*., 566 F. 3d 1012, 1021 (Fed. Cir. 2009). In *Autogenomics*, just after the portion of the opinion quoted by Google (Docket No. 71 at 9), the panel noted that district courts are required to "examine the jurisdictional facts for conduct whereby the patentee 'may be said to purposefully avail itself of the forum and to engage in activity that relates to the validity and enforceability of the patent.'" *Id*. Later, the *Autogenomics* panel summarized its findings, analyzed the relevant case law (including *Avocent*), and explained that the foreign defendant was not subject to personal jurisdiction due to an absence of enforcement activities in the forum:

> Our holding in *Avocent* was that only enforcement or defense efforts related to the patent rather than the patentee's own commercialization efforts are to be considered for establishing specific personal jurisdiction in a declaratory judgment action against the patentee. The dissent suggests that this reading of *Avocent* renders it in conflict with other precedent of this court. The court in *Avocent*, however, considered and distinguished the very precedent that the dissent cites. In *Viam*, for example, where this court held personal jurisdiction existed, the patentee had sued another infringer in the same court on the same patent—*enforcement efforts in the forum*. 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*. In *Red Wing Shoe*, despite the patentee's thirty-four non-exclusive licensees selling the patented product in the forum State, no personal jurisdiction existed because of an absence of enforcement efforts [in the forum].

*Id*. at 1020 (emphasis added). Here, Rockstar cannot be said to have "purposefully availed itself" of the NDCA in any way, other than the presence of Apple, one of its five limited partners in the NDCA, that Apple is alleged to benefit from Rockstar's patent enforcement activities in Texas and the fact that Rockstar and Apple have limited and normal partnership-partner interactions (*e.g.*, reports of ongoing business activity).[5] None of these alleged "obligations" or "activities" aresufficient under controlling Federal Circuit precedent to subject Rockstar to personal jurisdiction in the NDCA. As the *Autogenomics* panel confirmed, under controlling Federal Circuit authority (including *Avocent*), the absence of "enforcement efforts in the forum" by Rockstar shows that Rockstar is not subject to personal jurisdiction in the NDCA. *Id*.

### C. Google's "Fall-Back" Assertion That It Has Alleged "Enforcement Obligations In California" By Rockstar Is Insufficient Under The Controlling Law.

In apparent recognition of the merits of Rockstar's assertion that under the facts as alleged by Google the controlling law requires Google to show enforcement activities by Rockstar in the NDCA for Rockstar to be subject to personal jurisdiction there, Google asserts that it has shown such activities. (Docket No. 71 at 10). Google alleges that Rockstar has "focused on the technology

[5]As explained in Rockstar's Motion, the types of "obligations" Rockstar is alleged by Google, and found by the Court, to owe Apple (e.g. updates on ongoing business activities), are normal obligations that every corporation or partnership owes to its shareholders or partners. (*See* Docket No. 66 at 8-9). No authority from the Federal Circuit, or cited by Google, stands for the proposition that such normal obligations are the types of "other obligations" sufficient to establish personal jurisdiction over a non-resident defendant under any of *Avocent*, *Radio Sys. Corp.*, or *Autogenomics*.

industry of California, including companies such as Google, Facebook and LinkedIn." (*Id.*) The apparent basis for this assertion is a magazine article quoting Rockstar's CEO John Veschi. (*Id.*)

Three facts undercut Google's assertion. First, at the time Google filed its declaratory complaint, Rockstar had not undertaken any judicial or extra-judicial enforcement activities under any of its patents (including the patents-in-suit) against any of Google, Facebook or LinkedIn, in any forum, much less in the NDCA. Since that time, Rockstar has only asserted infringement of the patents-in-suit against Google in Texas (and as counterclaims to Google's complaint in this Court, following the Court's denial of Rockstar's Motion to Dismiss). Second, the allegations Google refers to are generic, they are not specific to any patents, much less the patents-in-suit. Rockstar owns well over 1,000 patents; the generic statements Google refers to do not subject Rockstar to personal jurisdiction in any forum (including the NDCA) in a suit by any of Google, Facebook or LinkedIn on any of its patents. Third, as recognized by the Court in its Order, in *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed.Cir.1998) and other cases including *Avocent*, *Autogenomics*, and *Radio Sys. Corp.*, the Federal Circuit recognized that the mere act of sending a cease and desist letter to a forum resident, or otherwise notifying forum residents of their infringement of specifically-identified patents, is insufficient to subject a foreign entity to personal jurisdiction in the forum. (*See e.g.* Docket No. 58 at 14-15). At most, the generic statements Google refers to (which, again, fail to specifically identify any patent, much less the patents-in-suit) are of the type permitted by *Red Wing Shoe*, *Avocent*, *Autogenomics*, and *Radio Sys. Corp.* This is insufficient to establish personal jurisdiction over Rockstar in the NDCA.[6] Accordingly, Google's "fall back" assertion fails.

[6] *See also Smugmug, Inc. v. Virtual Photo Store LLC*, Case No. 09-cv-2255 CW, 2009 U.S. Dist. LEXIS 112400, *11 (N.D. Cal. Nov. 16, 2009) (J. Wilken) (letters sent by patentee to California companies seeking to discuss potential licensing terms "are not the type of enforcement activity envisioned in *Autogenomics*, but rather Defendant's efforts at commercialization; they cannot be used to support specific jurisdiction").

## III. Certification Will Materially Advance The Litigation.

Google asserts that certification of the Court's Order will not materially advance the litigation because Courts "routinely" deny certification of case-dispositive issues (*e.g.* summary judgment motions, where there are disputed issues of material fact and motions to dismiss) and regardless the Texas Action will continue. (Docket No. 71 at 10-11). Neither argument carries water.

First, as the Ninth Circuit stated in *Reese* (in the context of granting certification of a motion to dismiss for lack of standing):

> [N]either § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation. The district court correctly concluded that our reversal 'may' take BPXA, as a defendant, and Reese's control claims against all remaining defendants out of the case. That is sufficient to advance materially the litigation, and therefore certification of the interlocutory appeal was permissible.

*Reese*, 643 F. 3d at 688. Here, it is undisputed that the Federal Circuit's reversal of the Court's Order *will* (not "may" as in *Reese*) take Rockstar as a defendant, together with all of Google's claims, "out of the case." 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). Moreover, here, while Rockstar disagrees with the veracity of various "factual" allegations by Google which were adopted by the Court in its Order (*see* Docket No. 66 at 2-3, *fn.* 1-3), resolution of the *legal issues* Rockstar asks the Court to certify for interlocutory review is predicated on "[a]ccepting Google's pleaded allegations that the Court's factual findings rest on as true." (Docket No. 66 at 2). Under the authority of *Reese* then, Rockstar has made showing that is "sufficient to advance materially the litigation" which shows that "certification of the interlocutory appeal [is] permissible."

Second, the standard under Section 1292(b) is whether certification will materially advance *the litigation*, not all related litigation between the parties. As such, the pendency of Rockstar's Texas cases, where personal jurisdiction is not at issue, is irrelevant to the determination of whether this Court should certify its Order for interlocutory appeal. That the parties have to endure the

burden of litigation in one forum is not a valid basis to subject the parties to parallel litigations in two forums, particularly where, as here, there are doubts about this Court's jurisdiction that are not present in Texas. Indeed, as Rockstar's Motion explained, immediate review here satisfies one of Congress's core objectives in Section 1292(b): avoiding the potential waste of judicial and party resources by litigating a large and complex case to conclusion in this district, only to have the threshold jurisdictional issue decided differently on appeal. (Docket No. 66 at 11, *citing 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."). Google cannot credibly assert that if the Federal Circuit was to reverse the Court's Order denying Rockstar's Motion to Dismiss *now* as opposed to at the conclusion of the litigation, that the parties and the Court will not each save a significant expenditure of time, effort and money.

**CONCLUSION**

For the reasons set forth herein, and in Rockstar's Motion, 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,

Dated May 30, 2014.

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

Courtland L. Reichman (SBN 268873)
MCKOOL SMITH HENNIGAN, P.C.
255 Shoreline Drive Suite 510
Redwood Shores, CA 94065
(650) 394-1400
(650) 394-1422 (facsimile)

Mike McKool (Admitted *Pro Hac Vice*)
mmckool@mckoolsmith.com
Douglas A. Cawley (Admitted *Pro Hac Vice*)
dcawley@mckoolsmith.com
Ted Stevenson III (Admitted *Pro Hac Vice*)
tstevenson@mckoolsmith.com
David Sochia (Admitted *Pro Hac Vice*)
dsochia@mckoolsmith.com
McKool Smith, P.C.
300 Crescent Court Suite 1500
Dallas, TX 75201
(214) 978-4000
(214) 978-4044 (facsimile)

Joshua W. Budwin (Admitted *Pro Hac Vice*)
jbudwin@mckoolsmith.com
McKool Smith, P.C.
300 W. 6th Street, Suite 1700
Austin, TX 78701
(512) 692-8700
(512) 692-8744 (facsimile)

***Attorneys for Defendants Rockstar Consortium US LP and MobileStar Technologies LLC***