

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC
F/K/A POLARIS IP, LLC

v.

GOOGLE INC., et al.

NO. 2:07CV-371-TJW-CE

**DEFENDANTS' JOINT MOTION *IN LIMINE* NO. 11: MOTION TO PRECLUDE
EVIDENCE OR ARGUMENT REGARDING JOINT DEFENDANTS' ALLEGED
INDUCED OR CONTRIBUTORY INFRINGEMENT**

Introduction

Defendants Google Inc. (“Google”), America Online, Inc., AOL, LLC, and Yahoo! Inc. (“Yahoo”) (collectively, “Defendants”) move to preclude Plaintiff from offering any evidence or argument on the issue of the Defendants’ alleged induced or contributory infringement of the ‘947 patent because neither Plaintiff’s infringement contents nor Plaintiff’s expert reports provide any basis for such allegations. Since filing the First Amended Complaint, Plaintiff has not made any allegations of induced or contributory infringement until its eleventh hour attempt to revive these allegations through supplemental interrogatory responses served only two weeks before trial. Specifically, Plaintiff has not provided the Defendants with any basis for an allegation of induced and contributory infringement in its Preliminary Infringement Contentions, Amended Infringement Contentions, or reports from its technical expert, Dr. V. Thomas Rhyne. Plaintiff must not be allowed to put forth unsupported theories of induced and contributory infringement, especially when they have failed to timely provide discovery regarding those contentions. Defendants will be materially prejudiced if Plaintiff is permitted to offer evidence or argument that was not disclosed to Defendants on the issue of induced or contributory infringement. Accordingly, Plaintiff should be precluded from offering any evidence or argument on these issues at trial.

Argument

The Local Patent Rules “exist to further the goal of full, timely discovery and provide all parties with adequate notice of and information with which to litigate their cases.” *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 822 (E.D. Tex. 2007) (quoting *IXYS Corp. v. Advanced Power Tech., Inc.*, No. C 02-03942, 2004 WL 1368860, at *3 (N.D. Cal. June 16, 2004)). The Rules “requir[e] plaintiffs to disclose their [] infringement contentions before discovery has even begun.” *American Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d

558, 560 (E.D. Tex. 2005). Proper infringement contentions provide a defendant with notice of a plaintiff's infringement theories. *Linex Techs., Inc. v. Belkin Int'l, Inc.*, 628 F. Supp. 2d 703, 706 (E.D. Tex. 2008). This notice focuses discovery and narrows issues for claim construction, summary judgment, and trial. *Connectel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 526 (E.D. Tex. 2005).

In this case, the Defendants propounded interrogatories to discover the evidentiary bases underlying Plaintiff's allegations of induced and contributory infringement. Plaintiff, however, waited until two weeks before trial to amend its interrogatory responses in an attempt to revive its claims of induced and contributory infringement. However, even in its recent supplementation, Plaintiff does not provide any basis to support these contentions. Indeed, Plaintiff's complaint and infringement contentions do not identify a single specific act of inducement.¹ Moreover, Plaintiff has not informed Defendants of the evidence it intends to present at trial to support its allegations of induced and contributory infringement.

Plaintiff's failure to inform the Defendants of the bases for its allegations of induced and contributory infringement is neither substantially justified nor harmless. Moreover, the Defendants will suffer material prejudice if Plaintiff is allowed to surprise Defendants at trial. Accordingly, Plaintiff should be barred from introducing any evidence at trial to support its conclusory allegations that Defendants engaged in induced or contributory infringement.

¹ Infringement contentions, in addition to a complaint, are required to provide notice of the accusing party's specific theories of infringement. *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004). The party's theories of infringement must be sufficiently particular to provide notice of infringement beyond what is provided by the language of the patent claims themselves. *Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006).

Conclusion

For the foregoing reasons, Defendants respectfully request that the Court preclude Plaintiff from offering any evidence or argument regarding induced or contributory infringement.

DATED: July 22, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served today with a copy of this document via electronic mail.

By /s/ Amy Candido
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