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

ROCKSTAR CONSORTIUM US LP AND NETSTAR TECHNOLOGIES LLC, **Plaintiffs,** **v.** **GOOGLE INC.,** **Defendant.**	**Civil Action No. 2:13-cv-893** **JURY TRIAL DEMANDED**

DEFENDANT GOOGLE INC.'S REPLY IN SUPPORT OF MOTION FOR THE COURT TO ENTER ITS [MODEL] ORDER FOCUSING PATENT CLAIMS AND PRIOR ART TO REDUCE COSTS, TO LIMIT THE NUMBER OF ASSERTED CLAIMS, AND TO EXTEND THE DEADLINE FOR THE PARTIES TO COMPLY WITH P.R. 4-2

Google's motion requests what should be non-controversial in this case: entering of the Court's [Model] Order Focusing Patent Claims and Prior Art to Reduce Costs ("Model Order"). Rockstar does not dispute the salient points of Google's Motion. That Rockstar has asserted 141 claims against Google. That 141 claims is far too many. That Rockstar will not assert anything close to 141 claims at trial. And that there is no way the Court and the parties can meaningfully address the myriad of claim construction issues—there are currently over one hundred terms in dispute—that arise from this many claims. Thus, it is appropriate for the Court to grant Google's motion and enter the Model Order as doing so will benefit the parties and the Court by focusing the case to a manageable scope.[1]

Rockstar's only argument in opposition to entry of the Model Order is based on its alleged issues with Google's Invalidity Contentions. (Dkt. No. 116, 8.) That Rockstar has concerns with the sufficiency of Google's Invalidity Contentions, however, is not a ground for denying Google's motion. Rockstar has separately filed a motion to strike Google's obviousness combinations, and Google will address the merits of Rockstar's motion in opposition thereto. (Dkt. No. 117.) Google believes that Rockstar's P.R. 3-1 Infringement Contentions do not comply with the Local Rules and Google will soon file its own motion to strike, which Rockstar will presumably oppose. Such disputes are not uncommon in patent litigation. But neither the Model Order nor the Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs in any way

[1] Rockstar's claim that Google proposed adoption of the Model Order without modification only two days before it filed its motion (Dkt. No. 116, 5) is incorrect. Google raised the issue of the Model Order in correspondence on April 14, June 11, and June 23, and the parties discussed Google's proposal during a telephonic meet and confer on June 23. (*See* Dkt. No. 117-3.) And, as is clear from Rockstar's counsel's June 25 letter (Dkt. No. 105, Ex. D), Rockstar agreed to jointly request that the Court enter the Model Order. (*Cf.,* Dkt. No. 116, 4-5.)

suggest that such disputes warrant departure from the Model Order, and they have no relevance to Google's motion.

That complaints regarding invalidity contentions do not warrant rejection of the Model Order is particularly apparent in this case because Rockstar's purported issue with Google's Invalidity Contentions is already dealt with in the Model Order. While Rockstar suggests that Google has not identified its obviousness contentions with specificity (Dkt. No. 116, 8), Rockstar's real objection is to the number of potential obviousness combinations in Google's Invalidity Contentions. This is evident from both Rockstar's repeated reference to the number of potential obviousness combinations (*see e.g.* Dkt. No. 116, 3, 8), as well as its rejection of every attempt by Google to address Rockstar's purported concerns regarding "specificity."[2] The Model Order, however, already provides that the patent defendant shall serve a Final Election of Asserted Prior Art by the date set for service of expert reports by the party with the burden of proof on an issue. The Final Election shall identify no more than six asserted prior art references per patent, and no more than a total of 20 references, and each obviousness combination counts as a separate prior art reference. (General Order No. 13-20) (emphasis added).

Rockstar nevertheless argues that narrowing the number of obviousness combinations at the Final Election according to the Model Order is too late because that will be two weeks after

[2] In particular, Google offered to re-format its obviousness contentions so that it provides quotes of the specific portions of its obviousness references that disclose the elements of the asserted claims in its anticipation charts, rather than referring to the tables in Exhibit B to its Invalidity Contentions. (Dkt. No. 117-3, 3.) Rockstar rejected that proposal. (*Id.*) Google further offered to identify no more than five references that Google presently intends to rely on for each of the six tables in Exhibit B. This amounts to a specific identification of no more 30 references total in these tables. (Dkt. No. 117-6.) Rockstar rejected that proposal as well, saying the "possible combinations remain unreasonably high." (Dkt. No. 117-7.) Rockstar also took issue with the fact that Google reserved the right to rely on other references identified in Exhibit B as the case evolved, as specifically contemplated by the Model Order. (Dkt. No. 116 at 5) But Rockstar ignores that Google's offer would advise Rockstar which obviousness combinations Google is focused on at this point in the case, so that Rockstar could do the same.

the close of fact discovery. (Dkt. No. 116, 8.) But the commentary of the Local Rules Advisory Committee shows it specifically elected to set the deadlines to serve the Final Election of Asserted Claims and Final Election of Prior Art based on expert discovery deadlines, not fact discovery because:

> [t]he principal object of the final narrowing is lessening the costs associated with expert witnesses and final preparation of the case for trial. . . . The timing of the final election also gives the parties maximum opportunity to consider discovery and claim construction in making their election, and may move the presentation of any discovery disputes to points earlier in the case.

(Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs, 5) (emphasis added). The Committee further noted: "[n]ot imposing this requirement for purposes of the preliminary election gives defendants increased flexibility to develop the appropriate combinations as discovery proceeds." (*Id.* at 6.) Rockstar's effort to modify the Model Order by requiring Google to reduce the number of obviousness combinations first directly contradicts the goals of the Local Rules Advisory Committee. Indeed, Rockstar is inappropriately seeking to foreclose Google from having the very "flexibility to develop the appropriate combinations as discovery proceeds" that the Model Order contemplates.

Moreover, the number of obviousness combinations identified in Google's Invalidity Contentions is a function of the number of claims asserted by Rockstar. Combinations would necessarily go down when Rockstar goes from 141 claims to no more than 32 claims, as it would under the Model Order. And if the Model Order is entered, Google would be further required to reduce the number of prior art references when it serves its Preliminary Election of Asserted Prior Art to no more than 40 total, and then again to no more than 20 total in the Final Election of Asserted Prior Art. (General Order 13-20.)

In short, Rockstar's complaints regarding Google's Invalidity Contentions do not warrant refusing to enter the Model Order. Rather, Rockstar's assertion of an unreasonably high number of claims necessitates entry of the Model Order, which will require both parties to focus the patent claims and reduce costs.[3]

For the foregoing reasons, Google requests that its motion be granted.

[3] In addition to requesting that the Court enter the Model Order, Google also asked the Court to order Rockstar to reduce the number of asserted claims to 15 claims per patent and no more than 50 total by July 14, 2014, or as soon thereafter as this matter can be heard. Contrary to Rockstar's arguments, this request is not mooted by the fact that July 14 passed because Google asked for Rockstar to make this reduction "as soon thereafter as this matter can be heard." Given that Rockstar does not dispute that it is currently asserting over 4.5 times as many claims as permitted under the Model Order, the parties and the Court would benefit from an immediate reduction in the number of asserted claims. Nevertheless, in light of the current date and that the Model Order would require Rockstar to reduce the number of asserted claims by September 2, Google is focused on the Court entering the Model Order. Google had also asked that the Court extend the deadline for the parties to comply with P.R. 4-2 to July 18. As the parties have already complied with P.R. 4-2, that issue is moot.

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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 July 30, 2014.

/s/ *Andrea Pallios Roberts*

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