

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. 13-cv-00893-RG
JURY TRIAL DEMANDED

**GOOGLE INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO
STRIKE GOOGLE INC.'S OBVIOUSNESS DISCLOSURE
UNDER PATENT RULE 3-3(B)**

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Introduction

Rockstar's motion to strike Google's obviousness combinations is facially directed towards prematurely limiting the number of prior art references and combinations at issue in this case and finds no support in the local rules, the case law, or the Court's [Model] Order Focusing Patent Claims and Prior Art to Reduce Costs (the "Model Order").

First, Google has fully satisfied its obligations under Patent Rule 3-3(b) and any perceived abundance of combinations directly results from Rockstar's assertion of 141 claims and its ambiguous infringement contentions. There can be no legitimate dispute that Google identified each reference that anticipates or renders each claim element obvious. Google identified, with specificity, the references for each obviousness combination along with the motivation to combine these references. Rockstar's motion rests, therefore, not on any deficiency in the specificity of Google's disclosures, but rather in its belief that Google has disclosed too much prior art.

Second, Google's combinations are appropriate given the number of claims Rockstar asserts in this matter. As the Eastern District Of Texas Local Rules Advisory Committee ("Advisory Committee") recognized, it naturally follows that the number of combinations increases exponentially with the number of references, which in this case, is commensurate with the 141 asserted claims. (Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs, 5). Google presently relies on fewer references (about 127) than there are asserted claims in the case (141), which is reasonable on its face. Even the Model Order never limits a defendant to fewer references than asserted claims. The number of Google's asserted combinations is thus a direct result of the number of asserted claims that Google must defend against. Indeed, in response to

Rockstar dropping a single claim, Google has already voluntarily dropped 12 of the 39 anticipatory references and 1 of its 7 obviousness charts that Google initially served.

Third, the relief Rockstar seeks in its motion—*i.e.*, the narrowing of Google’s obviousness combinations—would already be provided for by Google’s motion to enter the Model Order currently pending before the Court (Dkt. No. 105). The Model Order provides the appropriate framework for streamlining the issues in this case, namely, two stages of issue-narrowing where a plaintiff first elects a subset of its claims before a defendant responds with its election of prior art. The Model Order refines and universalizes the procedures contemplated by the Patent Rules—it provides that the number of combinations shall be limited only after a plaintiff first undergoes two stages of focusing the asserted claims. In this case, that would not occur until February 2015. In short, if Rockstar wants to narrow the universe of prior art at issue, one good way to start is by first narrowing the universe of asserted claims.

Fourth, granting Rockstar’s motion would severely prejudice Google’s defense. Should the Court grant Rockstar’s motion to strike Google’s obviousness combinations and deny Google’s earlier-filed motion for entry of the model order and reduction of asserted claims, as Rockstar vigorously advocates, Google would be left with zero obviousness combinations to defend against 141 asserted claims. Rockstar’s overreaching position directly contradicts the well-established procedures recognized by this Court, as well as the Federal Circuit, where plaintiffs first narrow their asserted claims before any narrowing of prior art by defendants. *See, e.g., In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1322 (Fed. Cir. 2011); *see also* Judge Davis’ and Magistrate Judge Love’s Sample Docket Control Orders.

Rockstar’s motion, designed to irrevocably prejudice Google, should be rejected.

Background

I. ROCKSTAR'S UNREASONABLE INFRINGEMENT CONTENTIONS

On March 24, 2014, Rockstar served 1,261 pages of infringement allegations, accusing a broad and vaguely-defined set of products or services of infringing 142 claims across seven patents.¹ On April 14, 2014, over a month before Google's P.R. 3-3 contentions were due, Google asked Rockstar to reduce the number of asserted claims, explaining that:

Rockstar's assertion of 144^[2] claims in 7 patents is unreasonable. As a practical matter, this is far too many. Not only is it extremely difficult for Google to analyze Rockstar's infringement contentions, but it will greatly increase the volume of Google's invalidity contentions, which will be a burden to all parties.

(Ex. A at 2 (emphasis added)).³ Google directed Rockstar to the Model Order, which provides a means of equitably narrowing the case and the burden on the Court and all parties. (*Id.*) Rockstar never responded to Google's valid concerns regarding the invalidity contentions and chose, instead, to continue asserting more claims than it could possibly present at trial.

II. GOOGLE'S GOOD-FAITH EFFORTS TO FOCUS THE ISSUES IN THE CASE

On June 3, 2014, Google served its invalidity contentions. Thereafter, Rockstar began sending complaints to Google regarding its invalidity contentions, each of which was rebutted by Google, including Rockstar's allegations regarding P.R. 3-3(b). As Google explained:

Exhibits A-1 through A-39 identify each combination that Google intends to rely on for each limitation. For example, page 12 of A-1 indicates that the references in Table B1 render claim element 1b of the '065 patent obvious. Table B1 identifies where to find the disclosure of claim 1b in each reference. The tables in

¹ The cover pleading to Rockstar's P.R. 3-1 contentions listed 144 asserted claims, but it did not include element by element contentions for two of those claims. Rockstar has since confirmed that it is not currently asserting those two claims. Subsequently, Rockstar dropped claim 1 of the '065 patent from the case, thus bringing the current number of asserted claims to 141.

² *See Id.*

³ Unless otherwise noted, all exhibit citations are to the exhibits attached to the declaration of Lance Yang.

Exhibit B streamline the disclosures. This is particularly necessary given Rockstar's continued assertion of 144 claims and refusal to provide sufficient specificity in its own infringement contentions.

(Ex. B (emphasis added)).

During a June 19, 2014 meet and confer, Google challenged Rockstar to explain how Google's identifications of combinations were deficient under the plain language of Patent Rule 3-3(b). It could not. (Ex. C at 2-3). At one point, Rockstar appeared to argue that Google should not have used multiple charts to identify its combinations. Google disagreed, but offered to combine its anticipatory and obviousness charts to resolve the issue. Rockstar rejected Google's proposal, and then pivoted to arguing that Google identified too many combinations. As Google summarized in a letter after the meet and confer:

We asked if Rockstar's concerns would be resolved if we re-served Google's Exhibit A charts and cited the various obviousness references in each chart rather than in Tables in Exhibit B, which is largely a word processing task. Rockstar responded that this would not solve the problem because the charts would be thousands of pages long. Thus, this circles back to Rockstar's complaint regarding the breadth of Google's invalidity contentions, which would be solved by entry of the Court's Model Order.

(Ex. C at 3). As Rockstar's rejection of Google's proposal reflects, Rockstar's issue was not whether Google had identified its combinations or how they were identified under P.R. 3-3(b), but rather, with the number of identified combinations.

On June 25, 2014, Rockstar confirmed that its only issue was with Google's allegedly "impermissibly high number of obviousness combinations." (Ex. D at 2). Rockstar then proposed that Google limit its references and combinations to a total of 50 at the deadline set for the preliminary election of prior art under the Model Order. As Google explained on June 30, 2014, Google could not accept Rockstar's one-sided proposal that limited Google's combinations 5 months before the deadline set by the Model Order—*i.e.*, the date for final elections:

First, September 16, 2014 is the date of Google's Preliminary Election, whereby Google must narrow its references to "not more than a total of 40 references" with

no requirement to narrow obviousness combination. The Model Order is designed this way by the Eastern District Of Texas Local Rules Advisory Committee for a reason: “Not imposing this requirement for purposes of the preliminary election gives defendants increased flexibility to develop the appropriate combinations as discovery proceeds.” This case is no different.

(Ex. E at 1 (emphasis added) (citations omitted)). As Google explained:

Your proposal effectively reduces Google’s defenses to a mere 10 combinations over the 40 references permitted by the Model Order at the Preliminary Election stage. Any such limitation on obviousness combinations severely impacts Google’s ability to mount its defense, particularly in light of Rockstar’s continued refusal to supplement its infringement contentions to provide sufficient notice of its infringement positions.

(*Id.* (emphasis added)).

On July 18, 2014, Google offered yet another compromise where Google would limit its obviousness case to no more than five references for each table in Exhibit B and no more than 30 references total, while reserving its right to rely on the other references identified in Exhibit B as the case evolves. (Ex. F at 3). Google noted that:

Google understands that Rockstar is complaining about the number of combinations disclosed in Google’s invalidity contentions, and not that Google has failed to identify and chart, on a element by element basis, each asserted combination. The basis for your allegation that the number of combinations is impermissible remains unclear. As Rockstar acknowledged during the July 10 in person conference, the local rules place no limit on the number of combinations.

(*Id.*). Rockstar rejected this proposal as well, while simultaneously resurrecting its allegation that Google did not “sufficiently identify any combinations.” (Ex. F at 2 (emphasis added)).

On July 22, 2015, Google responded and noted that Rockstar’s shifting-sands approach to Google’s contentions prevented meaningful progress in the parties’ discussions:

Google cannot provide a proposal to address Rockstar’s concerns—and the parties cannot narrow the issues to be addressed by the Court—if Rockstar keeps changing the target. If Rockstar intends to request relief from the Court, please identify whether Rockstar will be moving to address the alleged insufficiently identified combinations, the number of combinations, or both.

(Ex. F at 2). Rockstar responded, acknowledging that Google did “identify thousands of potential combinations”; however, Rockstar alleged that “Google’s impermissibly high number of combinations vitiates any identification of them.” (Ex. F at 1).

Once it became clear that Rockstar had no intention of narrowing its claims according to the Model Rules, Google filed its motion for entry of the order whereby both parties would narrow their contentions. (Dkt. No. 105). In response, Rockstar filed the instant motion, arguing that only Google should be required to limit its defenses with no corresponding narrowing of Rockstar’s offensive case.

Argument

As an initial matter, Rockstar does not assert—as it cannot—that Google failed to satisfy P.R. 3-3(a) and (c). Google’s invalidity contentions identify each item of prior art that anticipates or render obvious each asserted claim with painstaking specificity. Google served charts identifying where specifically in each reference each element of each asserted claim is found. The only issue raised by Rockstar in its motion is whether, despite Google’s compliance with the plain language of P.R. 3-3-(b), Google’s has somehow otherwise failed to satisfy P.R. 3-3(b). It has not. Google has provided a proportional and justified number of references and combinations consistent with Rockstar’s 141 asserted claims and vague infringement contentions. Indeed, as noted above, Google has identified fewer prior art references than the number of claims asserted by Rockstar.

I. GOOGLE HAS FULLY COMPLIED WITH PATENT RULE 3-3(B)

A. Google Has Properly Identified Its Obviousness Combinations

Patent Rule 3-3(b) requires that for each instance where the accused infringer contends that “a combination of items of prior art makes a claim obvious, each such combination, and the motivation to combine such items, must be identified.” Google’s invalidity contentions indicate

each such combination, including presently known motivations to combine the references underlying each such combination. Thus, Google has fully complied with this requirement of Patent Rule 3-3(b), and Rockstar’s arguments to the contrary are simply wrong.

Google provided highly detailed charts in Exhibits A and B of its invalidity contentions (*See, e.g.*, Exs. H and G, respectively, to the instant brief) that identify obviousness references and how these references can be used in particular, specifically-identified combinations, to render the claims of the each asserted patent obvious. As Google explained to Rockstar on June 3, 2014:

Exhibits A-1 through A-39 identify each combination that Google intends to rely on for each limitation. For example, page 12 of A-1 indicates that the references in Table B1 render claim element 1b of the ‘065 patent obvious. Table B1 identifies where to find the disclosure of claim 1b in each reference.

(Ex. B (emphasis added)).

In its motion, Rockstar repeatedly alleges that Google’s invalidity contentions require Rockstar to “consider every possible combination of the references cited.” (*See, e.g.*, Mot. at 1 (emphasis added). However, that is simply untrue. Even a cursory review of Google contentions reveals that prior art references, and thus combinations, are tailored for specific elements. For example, Google identified “For More About Tide, Click Here” by Zachary Schiller, Bloomberg Businessweek, June 2, 1996 (“Schiller”). (Ex. G at 215). Schiller, however, has only been asserted against 5 of the 141 asserted claims. (Ex. H at 42, 43, 58, 59, 6, and 64). Google is certainly not asking Rockstar to consider every possible combination of every reference cited. Rather, Google asserts that it should be allowed to rely on those specific combinations that were identified with particularity under 3-3(b).

Rockstar complains that Google’s combinations violate an alleged “notice” requirement in P.R. 3-3(b) that limits the number of combinations afforded to defendants in their preliminary invalidity contentions. (Rockstar Br. at 5). However, as counsel for Rockstar acknowledged at

the July 10, 2014 meet and confer (Ex. F at 3), Patent Rule 3-3(b) does not impose a limit on the number of combinations that may be asserted at this stage of the litigation. This makes sense as there is no corresponding limit on the number of asserted claims plaintiffs can assert against defendants in its infringement contentions.

Further, the Model Order, which Rockstar admits “does not alter” the requirements of P.R. 3-3 (Ex. I at 2), expressly declines to limit the number of obviousness combinations until the expert discovery phase. (Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs, 5). “Not imposing this requirement for purposes of the preliminary election gives defendants increased flexibility to develop the appropriate combinations as discovery proceeds.” (*Id.* (emphasis added)).

B. Google’s Combinations Are Consistent With Rockstar’s Infringement Contentions

Even if the Court finds that P.R. 3-3(b) limits the number of identified obviousness combinations, Google’s combinations are certainly justified in this case. The number of Google’s specifically identified combinations is commensurate with the size of this case, in which Rockstar now asserts 141 claims across 6 patents, in a crowded field of art, and has failed to articulate its infringement contentions with sufficient detail to permit Google to unambiguously understand the purported interpretation and scope of the claims. (*See* Dkt. No. 122). Google relies on fewer references (approximately 127) than the number of claims Rockstar continues to assert (141). Even the Model Order never requires a defendant to use fewer references than asserted claims. At the deadline set for the preliminary election of prior art, the Model Order allows Defendants to maintain 40 prior art references for every 32 asserted claims. (Model Order at 1). That the combination of these references may be “exponentially” high is simply an expected reality and one that the Court’s Advisory Committee explicitly

recognized while deciding not to limit obvious combinations before expert reports. “A small number of prior art references can be combined to form an exponentially greater number of bases for invalidity.” (Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs, 5). Thus, Google’s current contentions are reasonable for this stage of the litigation.

C. Google Has Properly Identified The Motivation To Combine Its Identified References

Rockstar’s accusation that Google has not identified the motivation to combine its obviousness combinations is also wrong and plainly misleading. Google has provided detailed narratives spanning 32 pages regarding the motivation to combine the identified references. Far from being deficient, Google provides element-specific narratives that are tailored towards particular obviousness references. For example, consider the following excerpt:

The prior art also disclosed using user preferences and/or creating user profiles to identify information, whether it be search results, ads, etc., that might be interesting to the user, including the references and systems listed in Table 5. For example, GALLAGHER disclosed a model that had three elements: individual user profiles, individual advertisement target audience profiles, and a mechanism for selecting and presenting advertisements to specific users who match the target audience profile. (GALLAGHER, p. 4.) GALLAGHER further disclosed an “enhanced” model, whereby the system used the search and browsing behavior of users to determine which advertisements to be shown to that user. (*Id.*, p. 5.) DEDRICK 1994 and DEDRICK 1995 similarly disclose consumers having personal profiles which contain demographic and psychographic information, and utilizing those profiles to identify content and advertisements that match the user’s profile. (*See e.g.*, DEDRICK 1994, p. 60; *see also* DEDRICK 1995.) DEDRICK 1994 further explicitly discloses monitoring a user’s behavior on an ongoing basis to build and maintain the user’s profile. (*See* DEDRICK 1994, p. 60.) And, Firefly developed a software, which on information and belief was used by Yahoo!, which allowed users to provide demographic information, and then as they used a site, rated their interests and that information was added to a user profile. (WILLIAMSON, p. 1.) Firefly’s software tools allowed its customers “to deliver targeted content and advertising, as well as, accurate measurements and reports regarding site activity.” (FIREFLY NETWORK AND YAHOO! OFFER CONSUMERS ABILITY TO INTELLIGENTLY NAVIGATE THE WEB, p. 2.)

Even outside of search and advertising, user preferences and user profiles were used to identify content that might be of interest to a particular user, specifically

to try to solve the problem of “information overload.” For example, FOLTZ described research conducted for predicting Technical Memos (“TMs”) that best matched employees’ technical interests. The Abstract describes: “Within Bellcore, approximately 150 new TMs are published each month, yet very few are relevant to any single person’s interests.” (FOLTZ, Abstract.) The paper analyzes different methods of identifying an employee’s technical interests. Employees provided a list of words and phrases that described their technical interests, and that information was used to select TMs to provide to them. (FOLTZ, p. 4-6.) HOFFEROR similarly discloses a system which used a user profile to rank e-mail information. (HOFFEROR, Abstract and Introduction.) This system disclosed monitoring a user’s reactions to material, including negative reactions. (*Id.*, Section 4.2.) And KAMBA discloses providing a personalized newspaper on the Web—The Krakatoa Chronicle—based on user profiles. (KAMBA, p. 1.) There, the system obtained user preference data based on explicit feedback from the user, and also implicit feedback based upon observations of the user’s interactions with news articles. (*Id.* p. 2.) The user’s profile would change based upon the interactions with news articles. (*Id.*, p. 8.) And, the layout of the personalized newspaper, i.e. the ordering of articles, was in part a function of the relevance of an article to the user’s profile. (*Id.*, p. 7.) (*See also* MORITA; EDWARDS; LIEBERMAN.) The prior art further considered a user’s past actions to determine whether content would be interesting to a user. (LIEBERMAN, p. 6.)

(Ex. J at 26-28). As this excerpt demonstrates, Google’s contentions are highly context-specific and analyze the specific overlap of the prior art with the asserted patent and the state of the art at the time.

Moreover, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) held that “[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation.” *Id.* at 419. “In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends.” *Id.* Google identified these additional reasons, like market demand, in its invalidity contentions. (*See, e.g.*, Ex. J at 13-15). Rockstar’s requested relief would result in defendants being precluded from asserting obviousness combinations that fall outside of the teaching, suggestion, and motivation framework, in violation of *KSR*.

II. THE COURTS FAVOR DEFENDANTS THAT FULLY AND TIMELY DISCLOSE THEIR COMBINATIONS IN PRELIMINARY INVALIDITY

CONTENTIONS

Rockstar fails to cite any case that strikes well-articulated combinations in a defendant's preliminary invalidity contentions that have been particularly identified according to P.R. 3-3(b), simply because they are potentially voluminous. To the contrary, even before the Model Order issued, courts regularly permitted lengthy invalidity contentions as long as the specific references and combinations were identified. *Tyco Healthcare Grp. LP v. E-Z-EM, Inc.*, 2:07-CV-262 TJW, 2010 WL 7853420 (E.D. Tex. Apr. 1, 2010) (allowing 700-page invalidity contentions on the basis that the invalidity contentions included "an in-depth narrative" of how each claim element is anticipated by the cited references). Rockstar's cases do not teach otherwise. Tellingly, each case raised by Rockstar involved motions to strike combinations that were not identified in preliminary contentions and none of the cases hold that defendants must limit the combinations identified in their preliminary contentions.⁴

Contrary to Rockstar's arguments, these cases caution that defendants should include all potential combinations that they may rely on in their preliminary contentions or risk being precluded from asserting combinations disclosed later in discovery. "Over time, the Federal Rules of Civil Procedure have been amended in favor of full and open discovery." *Finisar Corp. v. DirecTV Group, Inc.*, 424 F. Supp. 2d 896, 898 (E.D. Tex. 2006) (emphasis added). "The

⁴ *LML Patent Corp. v. J.P. Morgan Chase & Co.*, No. 2:08-cv-448, 2011 WL 5158285 (E.D. Tex. Aug. 11, 2011) dealt with a motion to strike "newly disclosed combinations" that were not disclosed in preliminary invalidity contentions and were "served after the close of discovery and less than four months before the trial setting." *Id.* at *1, 3 (emphasis added). The court in *Finisar Corp. v. DirecTV Group, Inc.*, 424 F. Supp. 2d 896 (E.D. Tex. 2006) struck "fifty-eight prior art references that were not listed in its preliminary invalidity contentions" and served in expert reports weeks after claim construction. *Id.* at *897 (emphasis added). *Cummins-Allison Corp. v. SBM Corp.*, No. 9:07-cv-196, 2009 WL 763926 (E.D. Tex. Mar. 19, 2009) also addressed "certain invalidity contentions that were not disclosed in Defendants Invalidity Contentions." *Id.* at *2. *Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-cv-144, 2009 WL 4782062 (E.D. Tex. Dec. 8, 2009) addressed a defendant who, unlike Google, did "not expressly chart the combinations it would later rely upon." *Id.* at *2.

purpose of the Local Rules is to ‘further the goal of full, timely discovery and provide all parties with adequate notice and information with which to litigate their cases, not to create supposed loopholes through which parties may practice litigation by ambush.’ *Cummins-Allison Corp. v. SBM Corp.*, No. 9:07-cv-196, 2009 WL 763926, *1 (E.D. Tex. Mar. 19, 2009) (emphasis added). Google has endeavored to do just that—Google has fully and timely disclosed the specific references and combination that it is currently aware of to minimize the necessity of introducing references later. It is Rockstar, not Google, that attempts to litigate by ambush by asserting 141 claims, most of which it knows it cannot present at trial.

III. DENYING ROCKSTAR’S MOTION WILL NOT PREJUDICE ROCKSTAR

Nor is it the case, as Rockstar contends, that “Google’s failure to disclose obviousness combinations significantly prejudices Rockstar.” For example, Rockstar argues that Google has served third-party subpoenas and asks: “Will the subjects of these subpoenas be part of Google’s obviousness case, and if so, how?” (Mot. at 6). Yet, Rockstar only need to look to Google’s invalidity contentions for the answer to its question. Returning again to the Schiller prior art, if Google were to serve a subpoena calling for documents or deposition testimony related to Schiller, for example, Google’s invalidity contentions identify the exemplary disclosure in Schiller, as well as each element, claim, and patent implicated by Schiller. This serves as precisely the notice that Rockstar alleges is lacking.

Rockstar’s real issue appears to be with the amount of discovery resulting from Google’s combinations. Again, adopting the Model Order—which focuses on “lowering the expense of the parties by focusing patent cases to the issues at the core of the dispute”—would address Rockstar’s complaints. (Eastern District of Texas Local Rules Advisory Committee Commentary Regarding Model Order Focusing Patent Claims and Prior Art to Reduce Costs, 2).

IV. THERE IS NO BASIS OR NEED TO STRIKE GOOGLE'S INVALIDITY CONTENTIONS

Even if the Court identifies deficiencies in Google's invalidity contentions, there is no need to grant Rockstar's motion, particularly because Google is committed to remedying any deficiencies identified by the Court (or Rockstar) in the manner and timeframe contemplated by the local rules, the Model Order, and the procedural schedule entered in this case. Further, the relief that Rockstar has requested is fully afforded to it in the ordinary course of litigation by entry of the Model Order.

Conclusion

For all the foregoing reasons, Google respectfully requests that Rockstar's motion be denied.

DATED: August 11, 2014

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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 August 11, 2014.

/s/ Lance Yang _____

Lance Yang