

**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

PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM GOOGLE INC.

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I. INTRODUCTION

Plaintiffs Rockstar Consortium US LP and Netstar Technologies LLC (“Plaintiffs”) move to compel Google Inc. to produce documents and request oral argument on this motion. The patents-in-suit go to the core of Google’s business: search plus advertising. Google bid \$4.4 billion to acquire an intellectual property portfolio from Nortel including these patents. Bonn Decl. Ex. 18. Google knows these patents. Google knows its own business.

Despite the Discovery Order’s requirement that the parties produce “all” responsive documents in their possession, Google has spent the past three months engaging in what can charitably be described as a discovery stonewalling effort. Discovery Order ¶ 3(b). Google is refusing to conduct a full search for responsive documents pursuant to the terms of the Discovery Order and ESI Order; is artificially narrowing its response to numerous document requests without any appropriate justification; and has otherwise refused to say whether or not it will produce documents responsive to a variety of requests, claiming—despite a two-month meet-and-confer process—that it still either fails to “understand” the requests or needs to further “investigate.” Plaintiffs bring this motion to resolve several disputes that the parties have been unable to agree upon, despite an extensive meet-and-confer effort, and also to bring resolution to issues on which Google has spent two months engaging in delay.¹

II. BACKGROUND

A. The Nature of Plaintiffs’ Claims

Plaintiffs filed suit against Google on October 31, 2013, alleging Google’s core products—including AdWords—infringe a family of patents that read on search plus advertising

¹ There are certain issues relating to Plaintiffs’ document requests on which we believe further meet-and-confer efforts may be fruitful. As such, we are deferring certain issues in the hopes that the parties can resolve their disagreements. This motion addresses issues as to which the parties fundamentally disagree or as to which Google has unreasonably delayed providing a meaningful response.

functionalities. Compl. ¶¶ 11-31. The patents-in-suit share a common specification, which was filed on February 13, 1997. Compl. Exs. A-G. Over a year after the specification for the patents-in-suit was first filed, Larry Page and Sergey Brin incorporated Google in September 1998. Bonn Decl. Ex. 19. The asserted claims read on search plus advertising functions that have since become the heart of Google’s business. For example, claim 1 of the ’969 patent reads on “receiving, from the user, a search request including a search argument . . . searching, based upon the received search argument . . . correlating the received search argument to a particular advertisement . . . and providing the search results together with the particular advertisement to the user.” Compl. Ex. B. The patents-in-suit also have numerous claims that read on a variety of features relating to delivering search results along with targeted advertisements, such as employing user profile data for various purposes including search result refinement and advertisement targeting, tracking selection of advertisements, as well as generating fee records and extracting tolls (i.e., pay-per-click). Bonn Decl. Exs. 10-16.

Google’s AdWords “allows advertisers to display advertisements on Google.com’s search results pages and on the sites of Google’s third-party partners.” *Woods v. Google Inc.*, No. 11-cv-1263-JF, 2011 WL 3501403, at *1 (N.D. Cal. Aug. 10, 2011). Google admits that its “primary source of revenue is its online advertising programs, including AdWords.” *Goddard v. Google Inc.*, No. 08-2738 JF, 2008 WL 4542792, at *2 (N.D. Cal. Oct. 10, 2008). Google attempted to acquire the patents-in-suit from their former assignee, Nortel, along with the remainder of the Nortel patent portfolio for an initial bid of \$900,000,000 that eventually rose to a \$4.4 billion offer. Compl. ¶ 8; see also Bonn Decl. Ex. 18. The price was insufficient, as a group led by the current shareholders of Rockstar purchased the Nortel portfolio, including the

patents-in-suit, for \$4.5 billion. *Id.* Despite losing its attempt to acquire the patents-in-suit, Google continues to infringe the patents-in-suit. Compl. ¶ 9.

B. The Discovery Dispute

The parties must substantially complete their document production by September 16, 2014. Docket Control Order at 3. The parties are required to produce “all” relevant documents without waiting for any discovery request. Discovery Order ¶ 3(b) (emphasis added). Plaintiffs sent Google a letter on April 30, 2014, listing categories of documents it expected to be included in Google’s production. Bonn Decl. Ex. 1. Google’s response has been months of delay and obstruction.

Google’s initial response consisted of its sophisticated counsel claiming it did not “understand” the relevance of approximately one third of Plaintiffs’ requests. *Id.* Ex. 2. While Plaintiffs have been happy to explain the relevance of their requests—and, indeed, have since been forced to expend dozens of hours doing so for no apparent reason—they cannot help but suspect Google engaged in feigned ignorance as a delay tactic. One such example appears below:

105. All documents concerning the location of where Google stores AdWords-related information for users within the United States.

Google does not understand the relevance of this request. Please explain. Nor does Google understand the meaning of “AdWords-related information for users.”

Id. Ex. 2. When Google sought to seal the courtroom for the trial of Function Media, Google understood the concept of “AdWords-related information for users” quite well. *Function Media L.L.C. v. Google, Inc.*, 07-cv-00279-CE, Dkt. 190 at 5 (E.D. Tex. Oct. 10, 2009) (arguing why “disclosure of Google’s technology methods for delivering ads to end users,” information about “Google’s contextual targeting,” and information regarding how “Google routes search requests to the appropriate data centers and processes those requests” would be harmful). There are numerous other instances of Google’s dubious claims of ignorance. Google has, for example,

claimed ignorance over statements appearing on its own websites (some of which it has since removed, only to then renew its claim of ignorance). Bonn Decl. Exs. 6 at 9; id. Ex. 7 at 3. Google has claimed not to understand that AdWords Quality Score was implicated by Plaintiffs’ Infringement Contentions because the phrase did not show up in a word search of the document—notwithstanding that Quality Score is displayed on numerous pages of the Infringement Contentions via screen capture images (which, of course, would not hit on a keyword search of the document). Bonn Decl. ¶ 4; id. Exs. 10-16. And Google has claimed burden in producing certain categories of documents, only to force Plaintiffs to propound interrogatories to obtain information regarding the nature of the burden. Id. ¶ 5; id. Ex. 8 at 4-5.

In light of the upcoming deadline for document production and Google’s extensive delay over a two-month period, Plaintiffs bring this motion to compel to resolve outstanding disputes.

III. ARGUMENT

A. Google Must Collect ESI from Relevant Custodians, Including Executives.

The parties submitted competing ESI proposals to the Court. Google argued that it need only produce documents collected from central repositories, and that custodial ESI in addition to e-mail would only be searched pursuant to limited custodians and search terms and in response to specific ESI requests. Bonn Decl. ¶ 6. Plaintiffs urged that the model ESI Order only applied custodian and search term limits to e-mail documents, but not to custodial ESI other than e-mail. Id. The Court agreed with Plaintiffs. See ESI Order. The ESI Order imposes limits on custodians and search terms for e-mail documents, but not for other custodial ESI. ESI Order ¶¶ 8-12.

Despite the fact that the Court has already rejected Google’s argument that its search of non-email custodial ESI should be limited, Google is apparently taking the position that its search of custodial ESI—in addition to e-mail—will be limited only to the “most significant” custodians it has disclosed to Plaintiffs. More troublingly, however, Google’s list of “most

significant” custodians is nothing of the sort. Instead, it appears that Google has disclosed lower-level employees in an effort to shield its senior executives from discovery. Google’s disclosure of custodians does not include a single member of Google’s Executive Management Group (“EMG”). Bonn Decl. ¶ 7. Google has refused to search email for Larry Page, Salar Kamangar, Susan Wojcicki, Sridhar Ramaswamy, and Nikesh Arora on the grounds that they are not “likely to have relevant, non-duplicative emails,” as compared to the subordinate employees Google elected to include on its custodial disclosure. *Id.* Similarly, Google has indicated that it will only search for certain responsive documents in the possession of Product Managers because it would be “duplicative and burdensome to require Google to specifically search for such documents in the files of Google’s very senior employees” Bonn Decl. Ex. 8 at 5; *id.* at 11 (searching lower-level custodians for Request Nos. 69-70).

These senior employees have been involved since the beginning of AdWords on both the technical and business side. Because Google’s infringement implicates the core of Google, the presentations, plans, and marketing materials presented by, to, and for the senior executives are the most likely source of relevant ESI information. Salar Kamanger, for example, appears to have run the team that developed AdWords, the accused product. Susan Wojcicki and Sridhar Ramaswamy ran the ads business during the relevant timeframe, and indeed Ms. Wojcicki has previously testified and been Google’s designated representative in patent cases involving advertisements. Nikesh Arora recently left Google this summer well after this suit was filed, but before then served as a chief business officer. And Larry Page not only is the founder of the company, he was head of products during most of the relevant timeframe and has been chief executive officer since 2011. Mr. Page also was involved in the Nortel auction and the decision

to bid \$4.4 billion. This group of people is most likely to contain relevant information regarding the importance of the accused products and explanations for how the products work.

This is not a new tactic for Google. In prior cases, Google has attempted to shield senior executives from discovery, which this Court has refused to countenance. For example, in *Function Media*, the Court granted a motion to compel Google to produce documents and testimony from founder Sergey Brin and Susan Wojcicki, despite Google's arguments that such discovery would be unduly burdensome. *Function Media L.L.C. v. Google, Inc.*, 07-cv-00279-CE, Dkt. 219 (E.D. Tex. Oct. 9, 2009); see also *id.* Dkt. No. 311 (E.D. Tex. Dec. 4, 2009). Contrary to Google's claim that Plaintiffs must somehow justify custodians with admittedly relevant documents should be included in Google's production, it is Google's obligation to justify why it need not comply with the Court's Discovery and ESI Orders. *McLeod, Alexander, Power & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (party refusing to produce discovery bears burden to establish why it need not comply with discovery requests).

The Court should require Google to comply fully with the Court's Discovery Order by searching these plainly relevant custodians' ESI and e-mail documents. This issue implicates all of Plaintiffs' discovery requests. In addition, to the extent Google has refused to respond to discovery requests at all on these grounds—i.e., with respect to Request Nos. 22—it should be ordered to produce responsive documents.

B. Google Must Produce Documents on Which It Refuses to Respond.

Much to Plaintiffs' dismay, despite the exchange of numerous letters and emails, dozens of hours discussing document requests by phone, and an in-person meet-and-confer between lead and local counsel, Google is still claiming that it needs to "investigate" whether it will produce responsive documents to a number of requests. Likewise, despite Plaintiffs' clear statements of their position verbally and in writing, Google refuses to acknowledge what Plaintiffs are seeking

for numerous requests, concocts its own straw-man requests, and then claims it has no documents responsive to its own request (rather than the request Plaintiffs actually made).

For example, Request No. 146 seeks “[a]ll organizational charts for any part of your company engaged in the design, development, or sale of the Accused Instrumentalities.” Bonn Ex. 1 at Request Nos. 146 & 148. Google responded that it does not maintain “organizational charts” in the ordinary course of business. Bonn Decl. Ex. 2. As it turns out, however, Google does maintain an employee directory, which lists for each employee his reporting chain all the way up to the top of the company. Google has offered to produce directory listings for the specific employees it identified in its Rule 26 disclosures. Id. Ex. 8 at 15. Plaintiffs have asked that Google not only search for those employees, but also for employees of relevant departments relating to the Accused Instrumentalities, starting with senior-most employees, then direct reports, senior vice presidents, team leads (product and technical), and one level below that. Id. Ex. 5 at 8; id. Ex. 7 at 6. Google refuses on the grounds that Google cannot input an employee-category but must input an employee name. Id. Ex. 8 at 15. Plaintiffs are not asking Google to input employee categories into its tool; instead, Plaintiffs have requested that Google identify the employees that fall within these categories and request their organizational data. The fact that it has taken two months to get a response to a straight-forward request for organizational data—and that Google nevertheless refuses to produce it on such unreasonable grounds—regrettably necessitates this motion to compel.

For numerous other requests, despite a two-month-long meet-and-confer process, Google still refuses to agree that it will produce responsive documents, instead stating that it needs more time to “investigate” the request. For example, Plaintiffs served several requests seeking documents regarding the location where Google processes data related to the Accused

Instrumentalities. Id. Ex. 1 (Request Nos. 96-109). Google initially responded, remarkably, by claiming it did not understand the relevance of such requests. Id. Ex. 2 (Request Nos. 96-109). As Google well knows, this information is plainly relevant to whether infringement occurs in the United States and within the territorial scope of Plaintiffs’ asserted patents. In re Google Litigation, No. 08-03172 RMW (PSG), Dkt. 318, Order Granting Mot. to Compel at 12 (N.D. Cal. Jan. 27, 2011) (holding “location of the accused Google” activity relevant under section 271(a)). Google apparently no longer claims it does not understand the relevance of these requests, but nevertheless persists in refusing to tell Plaintiffs whether it will produce responsive, non-privileged documents, instead stating that it needs more time to “investigate” these requests before agreeing to do so. Bonn Decl. Ex. 8 at 13.²

Given the upcoming production deadline—and the fact that Google has had Plaintiffs’ document requests for months—Plaintiffs can no longer wait for Google to finish “investigating” whether it will agree to produce responsive, non-privileged documents.

C. Google Must Produce Documents Regarding Infringement, Damages, and Validity.

Google has apparently decided unilaterally which products are “properly accused” of infringement and intends to limit its production accordingly. For example, Request No. 26 seeks certain documents regarding DoubleClick, which Google admits is included in Plaintiffs’ Preliminary Infringement Contentions. However, Google refuses to produce responsive documents on the grounds that DoubleClick “is not used by Google’s Search Ads, and thus is not

² Google has similarly and repeatedly refused to clarify whether it will produce documents in response to a variety of requests, including Request Nos. 28, 39, 117 and 119-22. Google has equivocated on whether it will agree to produce responsive custodial documents—i.e., documents other than its Rule 3-4(a) production—in response to various requests, including at least Request No. 25. Bonn Decl. Ex. 8 at 5. And Google has otherwise spent letter after letter claiming ignorance over requests that ask for statements Google itself made on its own website (and now has apparently removed). See, e.g., id. Ex. 9 at 6-7 (Request No. 34).

properly accused.” Bonn Decl. Ex. 8 at 6. Along similar lines, in response to Request No. 44, which calls for production of documents regarding Google’s use of “prior purchasing information,” Google has responded that it does not employ “user-specific prior purchasing information” and thus refuses to produce responsive documents. Id. Ex. 6 at 10; Id. Ex. 7 at 3. This apparently is based on Google’s claim construction position, on which the Court has not yet ruled. In yet another example, Google refuses to produce responsive documents regarding YouTube Interest Based Advertising and Knowledge Graph on the grounds that (1) although it “understand[s] that YouTube is an accused product,” it believes “interest based advertising really isn’t covered by the asserted claims” and (2) although Plaintiffs assert Knowledge Graph is relevant to its search refinement claims, Google’s position is that “Search generally is not accused.” Id. Ex. 21 (Request Nos. 53, 57). And in yet another example, Google refuses to produce documents regarding its “search terms reports” because Search, standing alone, is not accused (although Google admits search plus advertising, including claims reading on search refinement and delivering ads based in part on search arguments, is). See id. Ex. 8 at 36.

Google’s disagreement with the merits of Plaintiffs’ infringement contentions is not a basis on which it can refuse to produce discovery. Nor is it appropriate for Google to withhold discovery on the grounds that if it prevails on its preferred claim construction, it believes that it will also prevail on its position that its product does not infringe. And it is certainly not appropriate for Google to refuse to produce documents that are relevant to Plaintiffs’ claims reading on, among other things, search refinement in a search-plus-advertising context merely because “Search generally” is not accused. Other courts have rejected Google’s attempt to limit its discovery obligations by deciding unilaterally whether it agrees with the merits of the plaintiff’s infringement contentions and claim construction positions. In re Google Litigation,

No. 08-03172 RMW (PSG), Dkt. 318, Order Granting Mot. to Compel at 7 (N.D. Cal. Jan. 27, 2011) (rejecting Google’s attempt to limit discovery because “even if the court’s ultimate claim construction” is in Google’s favor, “the operation of [products at issue] may nevertheless be material” for damages purposes “under a Georgia-Pacific reasonable royalty analysis”). The Court should do likewise here and order Google to produce responsive documents related to Plaintiffs’ Infringement Contentions, regardless of Google’s view of the merits of its claim construction and non-infringement positions.

In addition to deciding which Accused Instrumentalities are “properly” accused of infringement, Google has also refused to produce documents relating to how it uses data collected from Accused Instrumentalities via any other products. See, e.g., Bonn Decl. Ex. 8 at 3-4, 9-10. This limitation that Google indicates it intends to impose on its document production relates at least to Request Nos. 13, 14, 17, 18, 26-27, 39, 57, and 58.³ According to Google, any connection between data collected from Accused Instrumentalities and the use of such data in other Google products is too “attenuated” to be relevant to discovery. Under *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), factor 6 considers “[t]he effect of selling the patented specialty in promoting sales of other products of the licensee; that existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or conveyed sales.” (emphases added). Indeed, the Federal Circuit has recognized that “[w]here a hypothetical licensee would have anticipated an increase in sales of collateral unpatented items because of the patented device, the patentee should be compensated accordingly.” *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 901 (Fed. Cir. 1986)

³ Plaintiffs do not believe it is appropriate for Google to limit its responses to any document requests on this basis, but the above are examples where Google has expressly indicated it would so limit its production.

(emphasis added). The extent to which Google uses data it gathers from its Accused Instrumentalities in its other products is reasonably calculated to lead to the discovery of admissible evidence regarding Georgia-Pacific factor 6.⁴

Finally, Google refuses to search for and produce certain documents relating to the validity of the patents-in-suit. For example, Request No. 90 seeks “[a]ll documents related to any time you have cited or mentioned any of the Patents-in-Suit, or their applications or foreign counterparts . . . including but not limited to in any other litigation or in any of your patent filings.”⁵ Bonn Decl. Ex. 1. To minimize burden on Google, Plaintiffs agreed to limit their requests to non-public patent filings or litigation documents. Google has refused to search for and produce such documents, claiming that (1) it is burdensome merely because such documents would be located in custodial data rather than a “central repository” and (2) “any relevance of such documents is minimal at best.” Bonn Decl. Ex. 6 at 15; id. Ex. 8 at 12. With respect to the first issue, the Court’s Discovery Order obligates the parties to “produce or permit the inspection of all documents, electronically stored information, and tangible things in the possession,

⁴ Google refuses to produce other documents relevant to damages. For example, Google refuses to produce documents regarding requests for indemnification by Google’s customers, prospective customers, or third-parties with respect to the Accused Instrumentalities. See Bonn Decl. Ex. 8 at 13 (Request No. 95). Along similar lines, Google refuses to produce documents “related to any revenue sharing agreements for advertisements served with search results on third-party sites.” Bonn Decl. Ex. 1 at Request No. 29. Plaintiffs have offered to minimize burden by permitting Google to first produce documents sufficient to show its top 50 publisher affiliates in terms of revenue. Id. Ex. 7 at 3. Google insists that it cannot respond to this request because it does not have a single document constituting a “list” of the top 50. Id. Ex. 8 at 6.

⁵ Google also refuses to produce documents regarding asserted prior art, except to the extent that (1) it agrees to produce the prior art itself and (2) it agrees to produce other documentation regarding “prior art systems.” Ex. 9 at 7 (Request No. 142). For example, Google is refusing to produce its own documents that refer to or discuss prior art such as patents or printed publications that Google is asserting in this lawsuit on grounds of burden. Id. Of course, such documents may be identified using search terms or other methods—and Google itself has asked for Plaintiffs to produce documents that refer to or discuss various asserted prior art patents and publications.

custody, or control of the party that are relevant.” Discovery Order ¶ 3(b). Nothing in the ESI Order alleviates the parties’ obligation to search for custodial data or limits the parties’ production of relevant material to that which is located in central repositories. In fact, as described above, the Court already has rejected Google’s improper attempts to shirk its discovery obligations regarding custodial data. Thus, the fact that Google would have to identify relevant custodians and search their ESI to locate such documents—as parties in almost any case must do—is not an appropriate burden argument. With respect to the second issue, it ought to go without saying (though sadly it doesn’t) that Google’s own statements regarding the patents-in-suit in its own patent filings or in other litigation is reasonably calculated to lead to the discovery of admissible evidence. Google should produce documents that relate to the patents-in-suit.

D. Google Must Produce Relevant Documents from Related Litigation.

In Request No. 93, Plaintiffs request that Google produce documents “related to and/or produced in any other lawsuit for patent infringement involving the Accused Instrumentalities, including but not limited to any expert report, exhibit lists, admitted exhibits, documents produced in the case, interrogatory response, deposition, trial demonstrative, declaration, affidavit, or testimony.” Bonn Decl. Ex. 1. The requests identifies several such cases, including *I/P Engine, Inc. v. AOL, Inc.*, No. 11-cv-512 (E.D. Va.); *Function Media, LLC v. Google, Inc.*, No. 07-cv-00279 (E.D. Tex.); *British Telecomm’s PLC v. Google, Inc.*, 11-cv-01249-UNA (D. Del.); *Xerox Corp. v. Google, Inc.*, 10-cv-00136 (D. Del.); *Microsoft Corp. et al. v. GeoTag Inc.*, 11-cv-00175 (D. Del.); *Bid for Position LLC v. Google, Inc.*, 07-CV-582 (E.D. Va.); and others. These are cases that also accused the same products and where Google already has produced relevant material. Given Google’s document retention policies, it is likely that these cases have relevant and responsive material that Google can produce immediately.

In response, Google has taken the position that it will make limited productions only from Personalized User Model and PA Advisors. Even as to those two cases, Google refuses to produce numerous categories of easily-identifiable and plainly relevant documents. First, Google refuses to produce infringement reports regarding its own products because “[t]hey are not Google admissions and thus there is no reason why Rockstar should have them.” Bonn Decl. Ex. 9 at 5. Second, Google refuses to produce the opposing party’s damages report in PA Advisors on the grounds that it might contain third-party confidential material—notwithstanding that Plaintiffs have offered for Google to produce the report in redacted form pending providing notice to the adverse party that the entire report would be produced. Third, Google refuses to produce its own documents that were marked as trial exhibits in Personalized User Model to the extent they contain any third-party confidential material. The documents requested from these cases are relevant, regardless whether they constitute an “admission” by Google of wrongdoing. And the fact that they may contain third-party confidential material does not obviate the need for production; instead, Google may take steps to notify third parties of the impending production and Plaintiffs would be willing to accept redacted documents pending such notification and to allow for a claw-back procedure should any documents inadvertently be produced.

More critically, Google is refusing to produce any documents whatsoever from I/P Engine, Function Media, Xerox, Microsoft, Bid for Position, or any of the other cases that Plaintiffs included in their requests. With respect to I/P Engine and Bid for Position, Google admits that the cases involved the Accused Instrumentalities, although it claims (without explanation) that they relate to different functionalities. Bonn Decl. Ex. 9 at 5-6. Contrary to Google’s unsupported argument that different functionalities were involved, demonstrative exhibits from the I/P Engine trial relate to the “Quality Score” functionality of AdWords. Id. Ex.

17. Likewise, Bid for Position related directly to the Quality Score functionality. See Bid for Position, LLC v. AOL, LLC, 601 F.3d 1311, 1312 (Fed. Cir. 2010). To the extent Google argues Function Media and Xerox only relate to AdSense for Content, they admittedly relate to Google products that benefit from targeting ads “related to what . . . users are looking for,” a functionality that may be relevant to various issues, including damages, in this case. Bonn Decl. Ex. 20. Moreover, although Function Media went to trial on AdSense for Content, the discovery also concerned AdWords, an Accused Instrumentality, as well. Thus, documents relating to those functionalities are reasonably calculated to lead to the discovery of admissible evidence. Google claims undue burden in producing documents from GeoTag and British Telecommunications because they involve multiple products in addition to the Accused Products. And it claims that cases involving Overture and Yahoo! were long ago, making searching for documents burdensome. But it would certainly not be unduly burdensome for Google to identify from those cases expert reports on infringement and damages, marked and admitted trial exhibits, and trial and deposition transcripts relating to the Accused Instrumentalities. Moreover, these cases were well after the priority date of these patents when Google was developing the accused products. To the extent that Google has these documents, it should produce them.

Finally, Google ought to produce any settlement or license agreements relating to search or advertising functionality. The Court has previously ordered production of all licenses bearing on accused products in similar cases. *MicroUnity Eng. Sys., Inc. v. Apple, Inc.*, 10-cv-00091-LED-RSP, Dkt. 445 (E.D. Tex. June 19, 2012). Google has indicated that it would only produce such agreements to the extent Google believes them to be “comparable licenses.” But while comparability might be the ultimate issue for the jury to decide in this case, it is not an issue for Google to determine in the first instance as a do-it-yourself gatekeeper. Cf. *Ericsson Inc. v. D-*

Link Sys. Inc., No. 10-CV-473, 2013 WL 4046225, at *17 (E.D. Tex. Aug. 6, 2013) (“Defendants’ arguments regarding the comparability of Mr. Bone’s licenses were more appropriate for cross examination than for judgment as a matter of law.”). See also, e.g., *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012) (“The degree of comparability of the . . . license agreements as well as any failure on the part of [the plaintiff’s] expert to control for certain variables are factual issues best addressed by cross examination and not by exclusion.”).

E. Google Must Produce Post-Complaint Documents for Good Cause.

In negotiating the ESI Order in this case, both parties agreed that they need not conduct general ESI searches for documents post-dating the filing of the Complaint. This makes sense so that the parties do not have to continually re-collect all ESI as the case progresses. Google, however, has taken the position that it need not produce any post-Complaint documents other than financial data. Bonn Decl. Ex. 9 at 8-9. It has said it would only agree to produce, for example, its post-Complaint communications with third parties regarding the lawsuit if Plaintiffs agreed it would not seek any other post-Complaint documents at all. Bonn Decl. Ex. 9 at 8-9. Regardless, the ESI Order is always subject to modification for good cause and the specific categories of documents relating to Request Nos. 72, 90, 95, and 111 satisfy that standard.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court permit oral argument and grant their Motion to Compel.

DATED: August 18, 2014

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that between June 18 and August 5, 2014, counsel for Plaintiffs (Justin Nelson, John Lahad, Amanda Bonn, Jeff Rambin, Elizabeth Derieux) repeatedly met and conferred via email and telephone with counsel for Defendant (David Perlson, Andrea Roberts, Lance Yang) regarding the issues presented in this motion. I further certify that lead and local counsel fro Plaintiffs (Max Tribble, John Lahad, Jeff Rambin) met and conferred in person with lead and local counsel for Defendants (Charles Verhoeven, Andrea Roberts, Blake Thompson) on July 10, 2014. The parties were unable to reach agreement on the issues presented in this Motion.

/s/ Amanda K. Bonn
Amanda K. Bonn

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service, are being served this 18th day of August, 2014 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Amanda K. Bonn
Amanda K. Bonn