

**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' RESPONSE TO DEFENDANT'S MOTION TO STRIKE PLAINTIFFS'
PATENT RULE 3-1 INFRINGEMENT CONTENTIONS**

Google's motion to strike Plaintiffs Rockstar Consortium US LP and Netstar Technologies LLC's ("Rockstar") infringement contentions is without support in law or fact. Indeed, Google fails to cite this Court's relevant cases in which software is accused. Likewise, Google misrepresents the contents of Rockstar's infringement contentions, which include: text describing the functionality of Google's products, screen shots demonstrating the operation of Google's products, publically available code demonstrating Google's infringement, and Google's own public admissions of how its products work. In reality, Google's motion is nothing more than retaliation for Rockstar's motion to strike Google's plainly deficient invalidity contentions. Google has admitted as much. If Rockstar's infringement contentions were truly as deficient as Google claims, Google would have immediately sought relief. Google did not. Thus, Google's motion is nothing more than a retaliatory motion meant to distract the Court from Google's noncompliant invalidity contentions as well as an egregious yet transparent attempt to avoid its discovery obligations and delay the disposition of this case on the merits.

I. Factual Background

a. Rockstar's Infringement Contentions

On March 24, 2014, Rockstar served Google with more than 1,200 pages of detailed infringement contentions. (Dkt. No. 40; Exs. 1-8). These contentions represent the culmination of hundreds of hours of work by Rockstar's expert consultants and attorneys performed over the span of several months during which Rockstar rigorously analyzed all of Google's publically available information, fully complying with Patent R. 3-1. Rockstar's infringement contentions explicitly state that the Accused Instrumentalities include:

Google Ads, Google AdWords, and Google AdWords Express (or similar functionality) used in conjunction with google.com, the Google Search app, the Android search bar, Google custom search, Google premium search services, youtube.com, Google search services provided to third party websites such as

Custom Search Services or AdSense for Search¹, and any Google-owned property that matches advertisements based in part on a received search term.

(Ex. 3 at 1). Rockstar also provided claim charts detailing Google's infringement of the asserted patents. The charts include not only text describing the functionality of Google's products, but also screen shots demonstrating how Google infringes when Google's products are in operation. (*See, e.g.*, Ex. 3 at 2-9 (demonstrating a search argument (at 3-8) included in a search request (at 9)).) When publically accessible, Rockstar also provided code demonstrating Google's infringement. (*See, e.g.*, Ex. 5 at 57-62, 96-97, 152-156.) Furthermore, Rockstar went beyond what the Patent Rules require by providing evidence of Google's own admissions of how its products work in the form of publically available Google blog posts and tutorials. (*See, e.g.*, Ex. 8 at 34-41 (demonstrating in Google's own words how it selects advertisements relating to search arguments using the user profile data.))

b. Rockstar Agreed to Amend Once Google Completes Source Code Production.

Shortly after the infringement contentions were served, Google began bemoaning its alleged inability to understand Rockstar's infringement theories. (Ex. 9 Roberts 4/14/14 Email). Rockstar responded in the only way that it could, by explaining to Google that it had fully complied with Rule 3-1—having provided Google infringement contentions as detailed as the totality of publically available information permitted. (Ex. 10 Lahad 4/18/14 Email). Rockstar has nonetheless, as Google admits, agreed to supplement its infringement contentions once Google has produced source code for each Accused Instrumentality. Google Br. at 3. Despite the fact that Rockstar has agreed to supplement its infringement contentions once source code is

¹ Google falsely contends that "AdSense is not even accused." Google Br. at 10. As the quoted text demonstrates, obviously it is.

produced in full, Google has incessantly harassed Rockstar regarding its infringement contentions all the while shirking its discovery obligations. *Id.*

c. Google's Failure to Timely Comply With Patent R. 3-4 Prevents Rockstar From Supplementing its Contentions.

Google contends that it complied with Patent R. 3-4 on May 20, 2014. Google Br. at 2. Not so. Patent R. 3-4 requires the Google to produce “Source code, specifications, schematics, flow charts, artwork, formulas, or other documentation sufficient to show the operation of any aspects or elements of an Accused Instrumentality.” Patent R. 3-4(a). Google failed to produce a single line of source code on May 20, 2014. Moreover, even after the protective order was entered on June 19, 2014, Google refused to produce any source code. (Ex. 11 Roberts 7/3/14 Email). Rockstar informed Google that “P.R. 3-4(a) requires the alleged infringer to produce any and all documents describing the operation of any aspects or elements of an accused instrumentality,” which obligation “clearly covers source code.” *Edward D. Ioli Trust v. Avigilon Corp.*, 2012 WL 5830711, at *3 (E.D. Tex. Nov. 16, 2012); (Ex. 12 Bonn 7/8/14 Email). Finally, on July 24, 2014, Google made a limited amount source code available for inspection. (Ex. 13 Roberts 7/24/14 Email). In doing so, Google admitted that the source code it was producing was incomplete. *Id.* (“Google expects to make additional code available for inspection.”) At the time of filing, Google has not yet produced source code sufficient to show the operation of each Accused Instrumentality. (Ex. 14 Bonn 8/27/14 Email). Nor has Google made a complete production of “any and all” other documents describing the operation of the accused functionalities. *Id.* Rockstar is under no obligation to supplement its infringement contentions until Google fully complies with Patent R. 3-4(a). Indeed, Rockstar cannot supplement its contentions until Google does so. Moreover, Google’s May 20, 2014 180,000 page document dump, consisting of large portions of irrelevant and nonresponsive documents comingled with

responsive documents—many of which are nearly unreadable to the naked eye—does not trigger Rockstar’s duty to supplement under the Discovery Order. *Id.* Once Google fully complies with this Court’s Rules and Orders by fully producing its relevant source code and completing its production of technical documents, Rockstar will supplement its infringement contentions in accordance with the Discovery Order.

II. Google Fails to Cite This Court’s Case Law Concerning Infringement Contentions and Software

Patent R. 3-1 requires “[a] chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality.” “Plaintiffs are expected to rigorously analyze all publicly available information before bringing suit and must explain with great detail their theories of infringement.” *Connectel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 528 (E.D. Tex. 2005). However, this Court recognizes that “PICs [preliminary infringement contentions] are not meant to provide a forum for litigation of the substantive issues; they are merely designed to streamline the discovery process.” *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004) (citation omitted). This Court also recognizes that “[s]oftware cases present unique challenges for the parties and the courts because, prior to discovery, plaintiffs usually only have access to the manifestation of the defendants’ allegedly infringing source code and not the code itself. From this manifestation, plaintiffs must somehow divine whether the defendants’ code infringes.” *Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005) (“AVG”). Moreover, in cases in which a defendant’s source code is not publically available “plaintiffs are typically unable to give highly specified infringement contentions.” *Id.*; *see also Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (“[I]n software cases, the Court has recognized the pragmatic limitation on detailed PICs when plaintiffs do not have the necessary access to non-public software, which is

needed to make detailed infringement contentions.”) “In these situations, through Rules 3–6 and 3–7, the Patent Rules recognize the preliminary nature of plaintiff’s preliminary contentions accommodate plaintiffs’ need to supplement their initial contentions.” *Id.* at 560-61. Thus, the Court recognizes plaintiffs’ need for source code prior to supplementation of their infringement contentions. Notably, Google makes no mention of *STMicroelectronics* or *AVG* in its brief despite the fact that this case involves software intensive Accused Instrumentalities.

III. Rockstar’s Infringement Contentions Satisfy the Demands of Patent. R. 3-1

Prior to March 24, 2014, the date on which Rockstar’s infringement contentions were due, Rockstar had access only to public information regarding the Accused Instrumentalities. In a case such as this, Plaintiffs are required to “rigorously analyze all publicly available information.” *Connectel*, 391 F. Supp. 2d at 528. Rockstar did just that. Rockstar has not, as did the plaintiffs in *Connectel*, “just allege infringement of hundreds of [products], submit those [product] manuals as evidence, and expect to narrow its claims upon the receipt of source code.” *Id.* In fact, Rockstar expects that each Accused Instrumentality infringes each claim asserted against that Instrumentality and anticipates that source code will confirm Google’s wide spread and pervasive infringement.

In reality, Rockstar’s expert consultants and attorneys expended hundreds of hours of work identifying Google’s potentially infringing products and services. Only those products that Rockstar believes infringe based on publically available information were listed in the infringement contentions. Rockstar’s claim charts describe Google’s Accused Instrumentalities on an element by element basis. The charts include where possible: (1) code showing the functionality of Google’s products (*See, e.g.*, Ex. 5 at 57-62, 96-97, 152-156.), (2) screen shots demonstrating how Google products satisfy each element of the claims (*See, e.g.*, Ex. 3 at 2-9),

and (3) evidence of Google’s own admissions of how its products work in the form of publically available Google blog posts and tutorials. (*See, e.g.*, Ex. 8 at 34-41.)

Like Rockstar, the plaintiff in *AVG* conducted an extensive investigation before serving its infringement contentions. *Connectel*, 391 F. Supp. 2d at 528. Also, like the plaintiff in *AVG*, Rockstar seeks source code to fill the gaps in its infringement contentions and definitively demonstrate the functionality of the Accused Instrumentalities. *Id.* Rockstar’s claim charts are, however, far more detailed than those found to comply with Patent R. 3-1 in *AVG*. For example, the *AVG* claim charts largely recited the claim language, and provided one sentence stating that each Accused Instrumentality found in an exhibit performed the function required by the claim language. *Am. Video Graphics*, 359 F. Supp. 2d at 559. As described above, Rockstar has done far more than that. In fact, the defendant in *AVG* suggested that the plaintiff should be made to “produce ‘screen shots’ to communicate how the games infringe. *Id.* at 560. The Court found this unnecessary. *Id.* at 561. Though screen shots are not required, Rockstar has provided them—along with other public information—to remove all doubt as to how the Accused Instrumentalities infringe the asserted claims. Therefore, Rockstar’s infringement contentions fully comply with Patent R. 3-1.

IV. Google Mischaracterizes Rockstar’s Infringement Contentions

Google contends that Rockstar’s infringement contentions are inadequate because they: (1) “incorporate screen shots in lieu of explanatory text,” (2) “merely parrot the claim language,” and (3) “purport to cover an uncharted product simply because they cover an allegedly similar charted product.” Google Br. at 5. Google is wrong on all accounts.

Rockstar has not simply incorporated screen shots in lieu of explanatory text. Rather, as demonstrated above, in addition to screen shots, Rockstar’s claim charts include code showing the functionality of Google’s products and evidence of Google’s own admissions of how its

products work. Moreover, this Court approved of the use of screen shots to illustrate infringement in *Global Sessions LP v. Travelocity.com LP* stating, “[t]o comply with P .R. 3–1, plaintiffs may use representative screenshots to illustrate specific theories of infringement with respect to websites accused in their entirety.” 2012 WL 1903903 at *5 (E.D. Tex. May 25, 2012); *see also Orion IP, LLC*, 407 F.Supp.2d at 817 (allowing representative screen shots rather than “screen shots for every possible manifestation” of the accused website).

Rockstar likewise does not “merely parrot the claim language” in its infringement contentions. As described above and demonstrated below in Section V, the claim charts contain evidence far beyond the mere parroting of the claim language. In fact, even Google admits as much. With respect to claim 1 of the ‘245 claim chart, Google admits that Rockstar provides “screen shots depict[ing] Google Search History, a google.com tutorial on how search works, a Google support web page on ad settings, a Google blog post on ad transparency, Settings for Google Ads on google.com, and instructions on creating one’s own Google account.” Google Br. at 7. Accordingly, Google’s allegation that Rockstar merely parrots the claim language is untrue even by Google’s account.

Finally, Google claims that Rockstar’s infringement contentions are inadequate because they “purport to cover an uncharted product simply because they cover an allegedly similar charted product.” Google Br. at 5. Google misunderstands the law. For support, Google cites *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819 (E.D. Tex. 2007) for the proposition that all Accused Instrumentalities must be charted. Google is incorrect. In *Computer Acceleration*, there were only two products and two claims at issue. *Id.* at 824. Moreover, the defendant had long since received source code for both products, but had not attempted to amend its contentions in compliance with the Local Patent Rules despite having promised to do so. *Id.*

Unsurprisingly, the Court held that both products should have been charted and struck the uncharted product. *Id.* at 825. By contrast, this Court has routinely approved the use of representative claim charts in infringement contentions in cases involving numerous Accused Instrumentalities and patents. *See Connectel, LLC v. Cisco Sys., Inc.*, 391 F.Supp.2d 526 (E.D.Tex.2005) (ordering defendant “to designate exemplar accused infringing products.”); *Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006)(“In dealing with something like a website, it would be unrealistic to expect plaintiffs to provide screen shots for every possible manifestation of the alleged infringement. Instead, plaintiffs should provide specific theories of infringement and representative examples of the alleged infringement.”); *Epicrealm, Licensing, LLC v. Autoflex Leasing, Inc.*, 2007 WL 2580969 at *3 (E.D. Tex. Aug. 27, 2007) (“discovery may include products and services (in this case, websites and systems) ‘reasonably similar’ to those accused in the PICs); *Plant Equipment, Inc., v. Intrado, Inc.*, Case No. 2:09-cv-395 (E.D. Tex. Feb. 1, 2012) (“Because [plaintiff] will have one infringement theory . . . , there is no need for [plaintiff] to provide additional charts for each and every permutation.”) Thus, Rockstar is not required to provide a separate claim chart for each Accused Instrumentality, but rather may provide “representative examples of the alleged infringement.” *Orion IP*, 407 F. Supp. 2d at 817. Rockstar has done exactly that.

V. Google’s Specific Examples of Alleged Deficiencies Show Its Position is Meritless.

Despite all the sound and the fury, Google only provides three specific examples of the infringement contention’s alleged deficiencies. Even a cursory examination of the claim charts debunks Google’s argument. Google first complains that with respect to claim 1 of the ’969 patent, which includes the limitation “receiving, from the user, a search request including a search argument corresponding to the desired information,” it is unable to determine what Rockstar contends is the search argument and what is the search request. Google Br. at 6-7.

Nonsense. The claim chart clearly shows the search argument “become a nurse” entered into the search box of numerous Accused Instrumentalities. (Ex. 3 at 2-8.) The chart then shows on the next page the search request, which is plainly and explicitly labeled “GET request of ‘Advanced Search.’” (*Id.* at 9.) In fact, in other charts the same image is labelled “GET “search request.”” (Ex. 5 at 16-17.) Moreover, the screen shot plainly demonstrates that the Get request of “Advanced Search” includes the search argument “become a nurse” on the third and fourth lines of the request. (Ex. 3 at 9 (“become%20a%20nurse”).) Thus, there is no ambiguity as to what Rockstar contends constitutes the search argument and the search request.

Google’s argument with respect to claim 1 of the ’245 patent is likewise flawed. Google claims that it is unable to distinguish between what constitutes “user preference input” and “user preference data.” In support of its position Google cites to the element “creating user preference data based upon the user preference input.” Google Br. at 8. Google completely ignores the element immediately preceding this element which states, “receiving user preference input from the data processing device via the communications link.” (Ex. 4 at 3-9.) In this element, Rockstar graphically lays out what constitutes user preference input. (*Id.*) For example, the first screen shot shows that a user can input preferences relating to language, geographic region, the site or domain, the terms appearing, the level of censorship of the search results, and more. (*Id.* at 3.) Rockstar also provides evidence that Google uses user preference input by citing to Google’s own blog post that shows that it uses those user inputs in its Accused Instrumentalities. (*Id.* at 4.) In the next element starting on page 10 of the ’245 claim chart, Rockstar demonstrates—often in Google’s own words—that Google creates user preference data based on the previously described user preference input. For example, the blog post on page 12 shows that Google keeps track of the user preference input—creating user preference data—such as location or prior

searches in order to provide the user with relevant advertisements. (*Id.* at 12.) Page 13 shows that Google creates user preference data from user preference inputs such as searches. (*Id.* at 13.) Specifically, the screen shot shows that Google has created user preference data in the interests section showing that the user is interested in Memory Card Readers. (*Id.*) Moreover, the screen shot shows that this data was created from the user’s “previous searches.” (*Id.*) Thus, it is obvious what Rockstar contends constitutes “user preference input” and “user preference data.”

Finally, Google contends that the “chart for claim 1 of the ’183 patent does not identify what the ‘first’ and ‘second display portion of a display of the data processing device’ are.” Google Br. at 3. The claim requires the display of search results in the “first display portion” and the advertisement in the “second display portion” of the display. (Ex. 7 at 45.) The very first screen shot provided by Rockstar refutes Google’s complaint. This screen shot is a graphic—created by Google itself—showing that advertisements occur in one portion of the display and search results in another. (*Id.*) These portions of the display are separated by a bolded red dashed line. Nothing could communicate more clearly that there are two display portions: one for advertisements and one for search results.

VI. Google Falsely Contends That Rockstar Makes Blanket Assertions of Infringement Under the Doctrine of Equivalents in Violation of Patent Rule 3-1(d).

Google contends that Rockstar has alleged that “to the extent [Rockstar] cannot prove literal infringement, every limitation of every claim is present under the doctrine of equivalents.”

Google Br. at 10. Rockstar has done no such thing. Rather, Rockstar claims:

that each element of each asserted claim is present literally in the Accused Instrumentalities unless expressly noted in the claim charts attached. To the extent any claim construction results in the Accused Instrumentalities falling outside the literal scope of any asserted claim, Plaintiffs reserve the right to contend that the Accused Instrumentalities still infringe under the doctrine of equivalents. Once the Court construes the claims at issue, Plaintiffs will designate which of such claims are infringed under the doctrine of equivalents.

(Ex. 1 at 4-5.) In short, Rockstar currently alleges literal infringement, but reserves the right to amend and assert infringement under the doctrine of equivalents if the Court construes the claims such that the Accused Instrumentalities fall outside the literal scope of the claims. This is proper. The Local Patent Rules provide that following claim construction a party may “without leave of court that amend its ‘Infringement Contentions’ with respect to the information required by Patent R. 3-1(c) and (d).” Patent R. 3-6(a)(1).

Moreover, even case law cited by Google contradicts its assertions and supports Rockstar’s position.² For instance, in *Schutz Container Sys., Inc. v. Mauser Corp.*, 2010 WL 2408983 *2 (N.D. Ga. June 11, 2010) (citing a Rule 3-6 equivalent) the court stated:

It is the Court's view the Plaintiffs are asserting a claim based on literal infringement and reinforcing their right to amend to plead under the doctrine of equivalents if the process of claim construction alters the meaning of the terms. It is within Plaintiffs' right to amend its disclosure within thirty (30) days of the Court's ruling.

Rockstar’s reservation of the right to amend its contentions to assert infringement under the doctrine of equivalents following claim construction, is entirely consistent with the court’s view in *Schutz* and Patent R. 3-6(a)(1). Accordingly, Google’s wrongheaded attempt to strike Rockstar’s contentions under the doctrine of equivalents should be rejected.

VII. If the Court Strikes Rockstar’s Contentions, Rockstar Requires Ample Time to Amend

As punishment for Rockstar’s imaginary sins, Google first proposes that Rockstar’s infringement contentions should be struck in their entirety without leave to amend. In the alternative, Google suggests that the Court should give Rockstar a mere ten days to amend its infringement contentions and continue the trial date. Both of these requests are laughable.

² Google’s citation of *ICON Internet Competence Network B.V. v. Travelocity.com LP*, 2013 WL 655024 (N.D. Tex. Feb. 22, 2013) in support of its motion to strike is bizarre. In that case, the court had already performed claim construction and then granted summary judgment of non-infringement. *ICON* had nothing to do with the sufficiency of infringement contentions under Patent R. 3-1.

In claiming that Rockstar’s infringement contentions should be struck in their entirety without leave to amend, Google cites no case in which this has ever happened much less one that is still in the middle of fact discovery. Indeed, in *H–W Tech., L.C. v. Apple, Inc.*, 2012 WL 3650597, at *5 (N.D. Tex. Aug. 2, 2012), cited by Google, after finding the infringement contentions deficient, the court struck the contentions without leave to amend only as to one product among many and allowed the plaintiff to amend its infringement contentions as to all other accused products. Likewise, in *Computer Acceleration*, the court struck only one of two accused products—a product that was previously completely uncharted. 503 F. Supp. 2d at 825. Moreover, the plaintiff had received source code from the defendants and failed to supplement as previously promised, the case was at a late stage—approximately 2.5 months from jury selection, and fact discovery closed the day the opinion issued. *Id.* at 824, fn. 2. None of this is true in this case. In reality, as the cases cited in Google’s brief demonstrate, this Court and others routinely grant leave to supplement deficient infringement contentions, particularly when the case is yet in fact discovery. *See, e.g., Connectel*, 391 F. Supp. 2d at 528-29 (granting leave to amend); *Linex Technologies, Inc. v. Belkin Int’l, Inc.*, 628 F. Supp. 2d 703, 714 (E.D. Tex. 2008) (same); *Digital Reg. of Tex., LLC v. Adobe Sys. Inc.*, 2013 WL 3361241, at *6 (N.D. Cal. July 3, 2013) (same); *Droplets, Inc. v. Amazon.com*, 2013 WL 1563256, at *3-5 (N.D. Cal. Apr. 12, 2013) (same).

Furthermore, Google fails to demonstrate that Rockstar’s contentions should be struck. Under the *Computer Acceleration* standard, on a motion to strike this Court considers the following factors: “(1) the reason for the delay and whether the party has been diligent; (2) the importance of what the court is excluding and the availability of lesser sanctions; (3) the danger of unfair prejudice; and (4) the availability of a continuance and the potential impact of a delay

on judicial proceedings.” *H-W Tech.*, 2012 WL 3650597 at *6 (citing *Computer Acceleration Corp.*, 503 F. Supp. 2d at 822). None of these factors favors striking Rockstar’s contentions.

As to the first factor, Rockstar exercised extraordinary diligence in creating its contentions. Rockstar expended hundreds of hours over several months scouring the internet searching for publically available evidence of infringement to produce claims charts that are approximately 1,200 pages in length. Moreover, to the extent that Rockstar has not supplemented its contentions based on Google’s confidential information, this is entirely Google’s fault. As noted above, Google failed to timely produce source code and has not yet produced many relevant portions of source code that would allow Rockstar to supplement. (Ex. 13 Roberts 7/24/14 Email); (Ex. 14 Bonn 8/27/14 Email.) Additionally, in dumping on Rockstar 180,000 pages of technical documentation—much of which is either irrelevant or unintelligible, Google has stifled Rockstar’s efforts to identify relevant technical materials that may aid in supplementation. (Ex. 14 Bonn 8/27/14 Email.) Finally, Rockstar contended from the beginning of this dispute that it would supplement its contentions once Google produced sufficient source code. Accordingly, this factor weighs against striking the contentions.

Google fails to even address the first half of the second factor: the importance of what the court is excluding, but rather, simply argues that striking is the appropriate sanction. Google wants Rockstar’s contentions struck in their entirety without leave to amend, effectively ending the case. Rockstar’s infringement contentions are of unparalleled importance as this case cannot continue without them. Moreover, the lesser sanction of requiring Rockstar to amend its contentions is available. Accordingly, this factor weighs against striking the contentions.

With respect to the third factor, there is no risk of unfair prejudice to Google because any prejudice that Google suffers is self-inflicted. Rockstar informed Google on April 18, 2014 that it

was in compliance with Patent R. 3-1 and would not supplement until required to do so by the Discovery Order. Nonetheless, Google delayed three and a half months before filing its motion and now hopes to successfully claim prejudice with respect to claim construction and discovery. Google cannot. *See Orion IP, LLC*, 407 F. Supp. 2d at 817-18 (“A defendant cannot lay behind the log until late in the case and then claim it lacks notice as to the scope of the case or the infringement contentions”). Google has long known when claim construction would begin and discovery would end, but chose to delay filing its motion to strike until now.

Moreover, Google was willing to forego moving to strike Rockstar’s contentions so long as Rockstar did not move to strike Google’s invalidity contentions. (Ex. 15 Roberts 7/25/2014 Letter at 4.) (“[I]f [Rockstar] moves to strike Google’s invalidity contentions, then Google will move to strike Rockstar’s infringement contentions.”) True to its promise, Google filed the present retaliatory motion only after Rockstar moved to strike Google’s invalidity contentions. Dkt. Nos. 117; 122. The conditional nature of Google’s motion belies the current claims of prejudice. Furthermore, had Google produced all of its relevant source code on the date it was required to—June 19, 2014 at the latest—Rockstar would have been required to provide updated contentions by July 19, 2014—a month prior to the beginning of claim construction briefing. Instead, Google delayed and has admittedly not yet completed its source code production. (Ex. 13 Roberts 7/24/14 Email).

Additionally, Google’s main complaint is an alleged lack of detail in the contentions. But, “[a]n amendment that adds specificity and detail to contentions concerning [previously identified accused products] ...will not prejudice Defendants.” *Thomas Swan & Co. Ltd. v. Finisar Corporation et al.*, Case No. 2:13-cv-178, Dkt No. 167 (E.D. Tex. Aug. 11, 2014) (citations omitted). Thus, this factor weighs against striking Rockstar’s contentions.

Finally, with respect to the final factor, fact discovery does not close in this case until January 7, 2015 and trial is more than nine months away. Google is once again trying to use supposedly deficient contentions to delay resolution of the case. Thus, this factor likewise weighs against striking Rockstar's contentions.

Google's alternative request—that the court provide Rockstar a mere ten days to amend contentions and continue the proceedings—is likewise absurd. Google well knows that Rockstar could not possibly amend 1,200 pages of infringement contentions in ten days. Google cites no case in which a party was given so little time to amend its contentions. In reality, courts routinely grant thirty to sixty days to amend deficient infringement contentions. *See, e.g., Connectel*, 391 F. Supp. 2d at 528-29 (granting 60 days to amend); *Digital Reg. of Tex.*, 2013 WL 3361241, at *6 (same); *Droplets, Inc.*, 2013 WL 1563256, at *5 (granting 30 days to amend). Given the breadth of infringement and the extensive nature of Rockstar's claim charts, should the court find it necessary, Rockstar requests sixty days to amend its infringement contentions.

In any event, no amendment is necessary here until Google completes its production. It would be wasteful of the parties' resources to amend infringement contentions only to re-amend them once Google completes its source code production. Especially given the breadth and scope of Rockstar's 1,200 pages of contentions, amending the original contentions before Google completes its source code production is unnecessary, duplicative, and wasteful.

VIII. Conclusion

In conclusion, Rockstar has fully complied with Patent R. 3-1 and Rockstar will supplement its contentions as required by the Discovery Order once Google completes its source code production. However, to the extent the Court disagrees, the Court should grant Rockstar sixty days to amend its contentions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 29th 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/ Shawn D. Blackburn
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