

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

Google's Reply misrepresents the facts and the law. For instance, Google claims that "Rockstar does not deny that its infringement contentions consist largely of bare screen shots." Reply at 1. Yet, Rockstar denied this repeatedly. Opp. at 2, 5, 6. Google also claims that "Rockstar does not deny that its charts mix and match different Accused Instrumentalities." Reply at 1. Yet, Rockstar expressly stated that its "claim charts describe Google's Accused Instrumentalities on an element by element basis." Opp. at 5. Moreover, the claim charts show element by element how Google infringes through www.google.com. (*see, e.g.*, Ex. 3¹). Google also claims that filing this motion was not retaliatory, but Google's words and actions show this claim to be false. *See* Reply at 1; Opp. at 14 (citing Ex. 15; Dkt. Nos. 117; 122).

Google, however, does not deny that Rockstar's infringement contentions contain publicly available code showing the functionality of Google's products, screen shots demonstrating how Google's products meet each claim element and evidence of Google's public admissions of how its products work. Nor does Google deny that it failed to timely provide source code as required under the rules. Finally, Google does not deny that it is responsible for any prejudice that it has suffered.

I. Rockstar's Infringement Contentions Easily Satisfy Patent R. 3-1

In its Reply, Google barely mentions the three examples of alleged deficiencies of Rockstar's infringement contentions that it relied upon so heavily in its opening brief. The reason for this is simple. As shown in Rockstar's response, the infringement contentions more than satisfy the requirements of Patent R. 3-1 with respect to each example cited by Google. Opp. at 8-10. Instead, Google faults Rockstar for not *sua sponte* addressing issues that Google did not raise in its opening brief. Reply at 1-2 (*e.g.*, complaining about "selection of an advertisement").

¹ All exhibit citations are to the exhibits attached to the declaration of Shawn D. Blackburn (Dkt. No. 138-1).

Remarkably, Google claims that *Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558 (E.D. Tex. 2005) (“AVG”) supports its position, yet Google does not deny that the claim charts provided in this case are far more detailed than those at issue in AVG. Google carefully states that the AVG court “did not comment on whether screen shots are required.” Reply at 2. But the case makes clear that the defendant asked for them and the court did not require their inclusion in the claim charts. *Am. Video Graphics, L.P.*, 359 F. Supp. 2d at 560-61.

Despite Google’s assertion to the contrary, Rockstar did not “mix and match” instrumentalities in its infringement contentions. Indeed, simply looking at the claim charts on an element by element basis reveals that Rockstar has charted for each element how Google infringes through www.google.com. (*see, e.g.*, Ex. 3). While Rockstar has included information in the charts related to other instrumentalities such as the Google Search app and youtube.com, that does not mean that Rockstar has “mixed and matched” instrumentalities. Rather, the charts merely demonstrate that the accused functionalities are found in many related Google products.

Google does not deny that this Court has routinely approved the use of representative claim charts in infringement contentions in cases involving numerous accused instrumentalities and patents. Rather, Google tries and fails to distinguish the cases cited in Rockstar’s opposition based on narrow factual differences. Reply at 3; Opp. at 7. Notably, Google admits that in *Connectel, LLC v. Cisco Sys., Inc.*, 391 F.Supp.2d 526, 528 (E.D. Tex. 2005) the Court did not just allow, but expressly ordered the plaintiff “to designate exemplar accused products” in its infringement contentions. Reply at 2, fn. 2. Moreover, Google is unable to cite to a single case involving a large number of accused instrumentalities in which the plaintiff was required to chart every single accused instrumentality as Google hopes to impose on Rockstar in this case. Google cites no case because no such case exists.

Despite the denial in its Reply, Google did admit that Rockstar's contentions "go beyond mere parroting," stating in its Motion that Rockstar provides "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." Mot. at 7. Finally, with respect to the doctrine of equivalents, Google claims that Rockstar's infringement contentions do not state that Rockstar has merely reserved the right to assert infringement under the doctrine of equivalents following claim construction. Reply at 3. Once again, Google attempts to mislead. Rockstar's contentions expressly state, "that each element of each asserted claim is present literally in the Accused Instrumentalities . . . 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." (Ex. 1 at 4-5). Google then inexplicably claims without citation that Rockstar concedes that "its contentions do not currently satisfy P.R. 3-1(d)." Reply at 3. Nothing could be further from the truth. Rockstar simply admitted what its contentions expressly state regarding the doctrine of equivalents.

II. Rockstar Did Not Withhold Anything From Its Infringement Contentions.

Google, without any evidentiary support, makes the extraordinary claim that Rockstar withheld information from its infringement contentions. Google bases its conspiracy theory on Rockstar's representation that it spent hundreds of hours compiling its claim charts. Reply at 4. Google reasons that it could not possibly have taken hundreds of hours to compile 1,200 pages of claim charts that contain publicly available code, screen shots of every single element of 130 claims, and Google's public admissions in the form of Google blog posts and tutorials. Reply at 4. Rockstar can assure the Court that it did. As such, Rockstar would require significant time to amend its contentions. Indeed, courts routinely grant 60 days to amend infringement contentions.

Opp. at 15 (citing cases). Google, however, provides no support for its suggestion that Rockstar must amend its contentions in a mere 10 days.

By contrast, Google withheld the source code that it was required to provide under Patent R. 3-4(a). Opp. at 3-4. Google claims without support that it has substantially completed its source code production. Reply at 5. This claim is in stark contrast to Google's admission to Rockstar that it has withheld source code, and even this week supplemented more source code. Opp. at 3 (citing Exs. 13-14). Moreover, Rockstar asked Google to remedy the deficiencies in its source code production, but Google has not done so. *Id.* Finally, Google admits that it dumped 180,000 pages of documents on Rockstar. Reply at 5. And Google does not deny that its document dump consisted of large portions of irrelevant and nonresponsive documents comingled with responsive documents—many of which are nearly unreadable to the naked eye—making it impossible for Rockstar to perform an efficient review. At any rate, once Google fully complies with Patent R. 3-4(a), Rockstar can amend its infringement contentions.

III. Google's Newly Raised Complaints are Without Legal Support

Having realized that its three specific complaints regarding Rockstar's contentions are meritless as shown in Rockstar's response, Google moves the target.² Google now complains that Rockstar did not provide the same explanations in its infringement contentions that are in Rockstar's response. Reply at 4. Google cites no case law that would require Rockstar to do so because no such case law exists. Moreover, Google misrepresents Rockstar's response. The response merely explains what anyone looking at the contentions would plainly see. The response does not provide any new information that is not already in the contentions.

² Google contends that Rockstar has avoided taking a position on the display issue. Reply at 4-5. Not so. The claim charts show that the first and second "portions of the display are separated by a bolded red dashed line." Opp. at 10. Moreover, Rockstar's proposal that this nontechnical term be given its "plain and ordinary meaning" is in accordance with Federal Circuit case law and common sense.

Google also complains that Rockstar did not provide highlighting in its contentions. Reply at 1. Google then admits that Rockstar did provide highlighting, but that highlighting did not help. *Id.* Nevertheless, Google cites no authority that highlighting is required. In reality, Rockstar's infringement contentions were more than sufficient to put Google on notice of Rockstar's infringement theories and Rockstar is required to do no more than that.

Google likewise argues that Rockstar must supplement its infringement contentions in response to Google's document dump and selective, and admittedly incomplete, source code production. *Id.* at 5. Google misunderstands the rules. Rockstar's contentions fully complied with Patent R. 3-1 at the time they were served. Thus, Rockstar is not required to supplement its contentions until Google has fully complied with Patent R. 3-4 by fully producing its source code. Rockstar will supplement, as it has promised to do since the beginning of this dispute, once Google fulfills its obligations under Patent R. 3-4. Moreover, serial amendments of the type that Google suggests would be wasteful of the parties' resources and are not required by the rules.

Additionally, Google does not dispute that had it timely complied with Patent R. 3-4, Rockstar would have been required to supplement its contentions many months ago. It is only because Google chose to withhold its source code that Google finds itself in the position that it is in now. Accordingly, any prejudice that Google suffers is of its own creation and Google is therefore not entitled to relief. Finally, Google admits that it chose not to seek relief from the Court for months. Mot. at 3. Indeed, Google only moved to strike Rockstar's contentions in retaliation after Rockstar moved to strike Google's invalidity contentions. (Ex. 15; Dkt. Nos. 117, 122). Thus, Google's own actions indicate that it suffered no prejudice related to Rockstar's infringement contentions. Accordingly, Google's motion to strike should be denied.

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Respectfully submitted,

By: /s/ Shawn Blackburn

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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 26th day of September, 2014 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Shawn Blackburn

Shawn Blackburn