UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC. Plaintiff, v. AOL, INC., *et al.*, Defendants.	Civil Action No. 2:11-cv-512

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION IN PART OF CLAIM CONSTRUCTION ORDER

Defendants' Motion for Reconsideration does not simply "rehash" positions already considered by this Court, as Plaintiff suggests. Rather, Defendants' Motion raises issues that were not considered by the Court due to a misunderstanding of the parties' dispute (and agreement) regarding certain of the claim terms. In its Opposition, Plaintiff does not provide any substantive response to Defendants' arguments. Instead, it simply argues that the standard for reconsideration has not been met. But Defendants have clearly shown that the Court overlooked or misconstrued the parties' dispute and agreement on key claim terms. This justifies reconsideration.

Argument

I. PLAINTIFF DOES NOT DISPUTE THAT THE COURT'S CONSTRUCTION OF "COLLABORATIVE FEEDBACK DATA" WAS BASED ON A MISUNDERSTANDING OF THE PARTIES' DISPUTE CONCERNING THE TERM.

The cornerstone of Defendants' Motion for Reconsideration is that the Court did not appreciate the parties' agreement that "collaborative feedback data" must pertain to users with similar interests or needs. Rather, the Court incorrectly understood this agreement to actually be what the parties disputed: "I/P Engine submits that that Defendants attempt to read an additional

source limitation into this claim by adding the requirement that the data must come from 'users with similar interests or needs' to the one limitation contained within the claim language that data must come from 'system users.'" (Order at 10.) This clear error regarding what the parties agreed to and what they disputed caused the Court to omit from the "collaborative feedback data" term in '420 claims 10 and 25 a requirement that the data relate to "users with similar interests or needs."[1] (*See* Dkt. 176 ("Opening Br.") at 1-4.)

In its Opposition, Plaintiff does not contest that the Court misunderstood the parties' dispute. Indeed, it does not address the above-quoted language in the Court's Order at all. Instead, Plaintiff only contends that the Court's misunderstanding of the parties' dispute is somehow not an appropriate basis for the Court to reconsider its claim construction. (Opp. Br. at 1.)

Plaintiff does argue that the Court's *Markman* Order "unambiguously addressed" the parties' agreement that collaborative feedback data pertains to users with similar interests or needs. (Opp. Br. at 4.) Plaintiff then pastes a large block-quote from the *Markman* Order. (*Id.*) But this block-quote does not contain any discussion or acknowledgement of the parties' agreement that collaborative feedback data pertains to users with similar interests or needs. This is because, contrary to Plaintiff's representations, the *Markman* Order did not acknowledge this agreement when construing the "collaborative feedback data" term.

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[1] As noted in Defendants' Motion, the parties' dispute for this term was whether this data regarding users, whom both parties agreed must have "similar interests or needs," comes from those users or simply concerns those users (but could come from some other source). (Opening Br. at 3-4.) In its ruling, the Court agreed with Defendants on the parties' actual dispute, stating "it is clear to the Court that the collaborative feedback data comes from system users and pertains to informons considered by those users." (Order at 9.) Plaintiff ignores this in its Opposition as well.

Plaintiff further argues that the parties' agreement regarding collaborative feedback is immaterial because "the court is free to adopt a construction independent of those suggested by the parties." (*Id.* at 5.) While it is certainly true that the Court may reach its own constructions, the Court did not consider and reject the parties' agreement on the term "collaborative feedback data." Instead, the Court failed to appreciate that this agreement existed at all. The parties' agreement that "collaborative feedback data" must pertain to users with similar interests or needs is powerful evidence that the Court should construe this term to contain a "users with similar interests or needs" element. Moreover, the Court adopted (without alteration) the five constructions that the parties agreed on in this case. (*See* Order at 8.) Thus, there is strong reason to believe that the Court would have adopted a construction of "collaborative feedback data" that referenced users with similar interests or needs had it appreciated the parties' agreement that "collaborative feedback data" must contain this element.[2]

II. PLAINTIFF DOES NOT REFUTE THAT THE "OTHER USERS" IN "[FEEDBACK SYSTEM FOR] RECEIVING INFORMATION FOUND TO BE RELEVANT TO THE QUERY BY OTHER USERS" MUST BE OTHER USERS WITH SIMILAR INTERESTS OR NEEDS.

The Court's misunderstanding of the parties' dispute concerning "collaborative feedback data" was also the basis for Defendants' request for reconsideration of its construction of "[feedback system for] receiving information found to be relevant to the query by other users" in '664 claims 1 and 26. (*See* Opening Br. at 5-7.) Plaintiff repeatedly admitted that the '664

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[2] The *Exxon* case cited by Plaintiff does not support its position. In *Exxon*, the parties disputed the pivotal question of whether the claims should be construed to require a product made from five starting ingredients or a product containing these five ingredients in its finished state. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1555 (Fed. Cir. 1995). There was no relevant claim construction agreement between the parties, as there is in this case.

claims must contain collaborative feedback. (*See id.*) However, because the Court did not appreciate the parties' underlying agreement that "collaborative feedback data" pertains to users with similar interests or needs, the Court did not construe the '664 terms at issue ("[feedback system for] receiving information found to be relevant to the query by other users") to require users with similar interests or needs.

Perhaps hoping to confuse the issues, Plaintiff first addresses "[feedback system for] receiving information found to be relevant to the query by other users" from the '664 patent (Opp. Br. at 3-4) and then addresses "collaborative feedback data" from the '420 patent. (*Id.* at 4.) But as discussed above, Plaintiff has it backward.

First, because the parties agreed that collaborative feedback data pertains to users with similar interests or needs, the term "collaborative feedback data" from the '420 patent must be construed to require users with similar interests or needs. Plaintiff ignores this point entirely. Not once in its Opposition Brief does it argue that construing "collaborative feedback data" without reference to users with similar interests or needs is the correct construction. Nor could it make this argument, as its own proposed construction stated that collaborative feedback data does require users with similar interests or needs.

Second, because the '664 claims must have a collaborative feedback element — a point Plaintiff has repeatedly conceded (*see* Opening Br. at 5) — the "[feedback system for] receiving information found to be relevant to the query by other users" in the '664 claims must be construed to require users with similar interests or needs as well. Only with this construction will the '664 claims contain the requisite "collaborative feedback" element, given the parties' agreement that "collaborative feedback" requires users with similar interests or needs. Plaintiff does not argue otherwise.

III. PLAINTIFF'S SUGGESTION THAT THE COURT CANNOT CHANGE ITS CLAIM CONSTRUCTION IS INCORRECT.

A large portion of Plaintiff's Opposition Brief is devoted to the procedural argument that the Court cannot change its claim constructions because the standard for a motion for reconsideration has supposedly not been met. (Opp. Br. at 1-2, 5-6.) But this is incorrect. As Plaintiff itself admits, a motion for reconsideration under Rule 54(b) is proper "to correct a clear error of law or prevent manifest injustice." (*Id.* at 1 (citation omitted).) Claim construction is a question of law, and the Court's failure to appreciate the parties' agreement that collaborative feedback data requires users with similar interests or needs led it to clearly erroneous constructions of "collaborative feedback data" and "[feedback system for] receiving information found to be relevant to the query by other users." In *Source Search Technologies, LLC v. Lending Tree, LLC*, 2006 WL 3289942, at *1-2 (D.N.J. Nov. 13, 2006), for example, the court granted a motion to reconsider its *Markman* order where it had construed a term based on its mistaken belief that the parties had agreed to that construction. In this case, the Court failed to recognize the parties' agreement that collaborative feedback data requires users with similar interests or needs. A motion for reconsideration under Rule 54(b) is appropriate to correct this clear legal error.[3]

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[3] As explained in Defendants' Opening Brief, *Lighting Ballast Control, LLC v. Philips Elecs. N. Am. Corp.*, 2010 WL 4946343 (N.D. Tex. Dec. 2, 2010) also supports Defendants' Motion for Reconsideration. Plaintiff asserts that *Lighting Ballast* is "not applicable to the present case" (Opp. Br. at 5), but this assertion is incorrect. In *Lighting Ballast*, the court granted a reconsideration motion and reversed its claim construction given that its original claim construction order "unduly discounted the unchallenged expert testimony." Id. at *10. Similarly, Defendants respectfully submit that this Court unduly discounted – indeed, failed to appreciate – the unchallenged position that collaborative feedback data must pertain to users with similar interests or needs. The logic of *Lighting Ballast* fully applies to the present case, and illustrates why a motion for reconsideration in these circumstances is proper.

Conclusion

For the foregoing reasons, and as explained more fully in Defendants' Opening Brief, Defendants respectfully request that the Court reconsider its constructions of "collaborative feedback data" and "[feedback system for] receiving information found to be relevant to the query by other users" and re-construe these terms to require feedback from users with similar interests or needs.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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