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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TOUCHSTREAM TECHNOLOGIES, INC., *PLAINTIFF*, V. GOOGLE LLC, *DEFENDANT*.	CIVIL CASE NO. 6:21-CV-569-ADA **JURY TRIAL DEMANDED** U.S. DISTRICT JUDGE ALAN ALBRIGHT

TOUCHSTREAM TECHNOLOGIES, INC.'S OPPOSITION TO GOOGLE LLC'S
RULE 50(b) MOTION FOR JUDGMENT AS A MATTER OF LAW

PUBLIC VERSION

Comcast, Ex. 1185
Comcast v. Touchstream
IPR2024-00326

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I. INTRODUCTION

Google's Motion for Judgment as a Matter of Law ("JMOL") seeks to undo the jury's factual findings and misapplies foundational principles of patent law. But substantial evidence supports the jury's findings. Google's products perform each and every step of Touchstream's patent claims, and Google's invalidity arguments failed for multiple reasons. Google fails to carry the heavy burden required for JMOL, and its motion should be denied.

II. LEGAL STANDARDS

Judgment as a matter of law is improper unless "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 384–85 (5th Cir. 2017). "[A]fter a jury trial, [the] standard of review is especially deferential." *Id.* A court may only grant JMOL when "the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable jurors could not arrive at a contrary verdict." *Raytheon Co. v. Indigo Sys. Corp.*, 895 F.3d 1333, 1338 (Fed. Cir. 2018) (*quoting Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 973 (Fed. Cir. 2010) (applying Fifth Circuit law)). The Court "must presume that the jury resolved all factual disputes in favor of the prevailing party," and the factual findings should be left "undisturbed as long as they are supported by substantial evidence." *Sibia Neurosciences, Inc. v. Cadus Pharmaceutical Corp.*, 225 F.3d 1349, 1354 (Fed. Cir. 2000).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDINGS OF INFRINGEMENT

A. Substantial Evidence Supports the Jury's Findings that Google's Products Include the Claimed "Server System."

Google argues the claim term "server system" was not properly construed and that its products do not use a "server system." Both arguments fail. The Court properly found that the term "server system" should be afforded its plain and ordinary meaning, rejecting Google's proposed

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limitations and resolving any scope dispute. The evidence introduced at trial provided substantial evidence for a reasonable jury to find that Google's accused products utilize the claimed "server system," along with every other aspect of the claims. *See generally*, Ex. A.

1. Google's Rehashed Claim Construction Arguments Fail.

Before trial, the Court resolved any dispute over the scope of "server system" when it rejected Google's proposed construction that a "server system" is a "separate and distinct instrumentality" from the "display device" and assigned "server system" its plain and ordinary meaning. Dkt. 225 at 50:17-19. Google continues to take issue with this ruling and again reiterates the rejected arguments from its summary judgment motion of non-infringement. Dkt. 130 at 1; Mot. at 1-3 (*citing 02 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008)). But "[u]nlike *O2 Micro*, where the court failed to resolve the parties' quarrel, the district court rejected [Google's] construction." *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1207 (Fed. Cir. 2010). Specifically, the Court, in denying Google's MSJ, resolved the parties' claim-scope dispute, considering fully-briefed argument regarding (1) the claims themselves, (2) the specification, (3) the prosecution history, and (4) extrinsic evidence. Dkt. 225, at 28-36; 50:17-19; Dkt. 161, at 3-16. Applying the plain and ordinary meaning at trial, Touchstream presented evidence from which a reasonable fact finder could determine that Google's accused products use a server system. Tr. 398:24-399:14; 401:1-402:13; 414:24-415:17. While Google now attempts to resurrect its claim construction arguments, "[r]estating a previously settled argument does not create an 'actual dispute regarding the proper scope of the claims' within the meaning of *O2 Micro*." *Finjan* (*citing Verizon Servs. Corp. v. Cox Fibernet Va., Inc.*, 602 F.3d 1325, 1334 (Fed. Cir. 2010)).

Even if the Court did not previously resolve the scope dispute (it did), there is no reason to

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revise the construction now in light of the intrinsic evidence and controlling precedent. As stated in Touchstream's MSJ response, Google conflated *logical* separation with *physical* separation: the claims recite the server system and display device as distinct components, but that does not require them to reside within different physical pieces of hardware. Dkt. 170, at 3-16; *Intell. Ventures I LLC v. Symantec Corp.*, 2016 WL 948879, at *3 (D. Del. Mar. 10, 2016), aff'd, 725 F. App'x 976 (Fed. Cir. 2018) (computer software is different than physical inventions, and system components can share a physical structure); *see Egenera, Inc. v. Cisco Sys.*, Inc., 547 F. Supp. 3d 112, 123–24 (D. Mass. 2021) (*citing NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1310 (Fed. Cir. 2005)). On this point, Google's cited cases are inapposite: they cover physical inventions where physical separation is the only kind of separation possible. *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249 (Fed. Cir. 2010) (medical needle patent); *Kyocera Senco Indus. Tools Inc. v. ITC*, 22 F.4th 1369 (Fed. Cir. 2022) (nailgun patent). Software is neither a nailgun nor a needle. As the District of Delaware explained in rejecting a similar argument based on *Becton*, "*Becton* involved physical components, whereas the [claimed component] in the present invention undisputedly involves both hardware and software. Here, the claims involve digital, rather than physical separation." *Intell. Ventures II*, 2016 WL 948879 at *3. The same is true here. *Becton* and *Kyocera* offer Google no support.

As discussed in the summary judgment briefing and at the pretrial conference, a plain-and-ordinary construction of the term "server system" is supported by the claims, specification, prosecution history, and extrinsic evidence. Dkts. 161, 225. The claims do not specify the display device and server system must be physically separate devices. Likewise, the specification describes the "server system" as including different server components running on different machines. *See, e.g.* 251 Patent 3:14-15, '528 Patent 3:9-10, '289 Patent 3:14-15; '251 Patent 11:9-

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16; '528 Patent 11:5-11; '289 Patent 11:9-16 (describing that components need not be separated).

Finally, the prosecution history supports the Court's construction. The Examiner required the "separate from" language for the "personal computing device," such that it must be separate from both the "display device" and "server system." But he did not require any similar limitation for the "server system." Dkt. 170, Ex. R Examiner Rejection, 5. In other words, only the "personal computing device" must be separate from the other components. If the Examiner had similar issues with the "server system," he would have asked for the same "separate from" language.

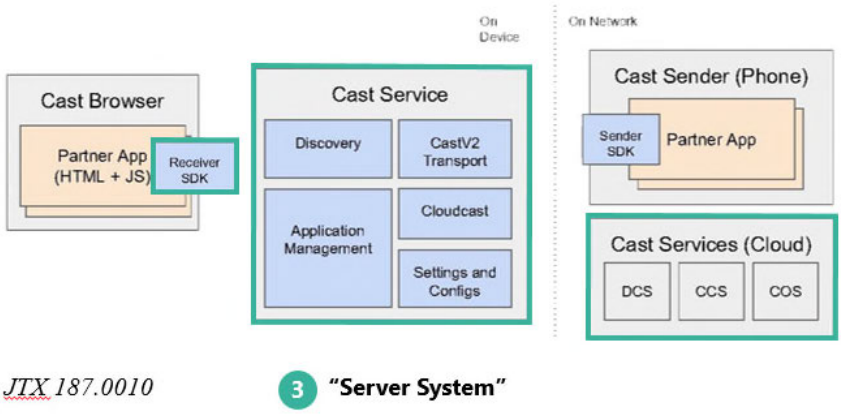
Google's citation to the prosecution history misconstrues the prior art and fixates on the mere mention of a local network in an attempt to overcome the plain meaning of the claims. Mot. at 5, Ex. 2. Here, Google does not and cannot point to any "clear and unambiguous" disavowal of relevant claim scope. *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1306 (Fed. Cir. 2007). Rather, the prosecution history cited by Googled related to a prior art patent application where the relevant operations occurred on the user's "computing device." *Id.*, Ex. 2 at 6-7. The distinction pressed in the file history was that, in that prior art, the relevant operations occurred on the "personal computing device," the one place the Touchstream patents say the "server system" cannot be. '251 Patent, 11:28-30; '528 Patent, 11:20-23, '289 Patent, 11:25-29; *see* Tr. 401:1-17 (Touchstream's expert, Dr. Almeroth noting the personal computing device and server system must be separate). This distinction in no way suggests that the server system must be physically distinct from the "display device," as Google now argues.

While the claims, specification, and prosecution history all support the Court's plain and ordinary construction, Google complains that Touchstream's expert, Dr. Almeroth, relied on a Microsoft technical dictionary to explain the meaning of a "server" to the jury. However, Dr. Almeroth was not engaged in claim construction analysis, and by the time he testified, the Court

had already ordered a plain and ordinary meaning. Thus, Google's complaints about Dr. Almeroth's reliance on this "extrinsic" evidence ring hollow; the Court already determined that physical separation was unnecessary, so it was appropriate for Dr. Almeroth to explain the plain meaning of the term "server" with reference to a well-accepted dictionary definition. Tellingly, Google does not dispute the accuracy of Microsoft's definition of "server," nor could it reasonably do so as its expert also relied on a Microsoft dictionary. Ex. B, Dr. Mayer-Patel Rebuttal Report. Here again, Google fails to provide any basis for the Court to revisit its prior claim construction holding or to grant JMOL of non-infringement based on its erroneous claim construction.

2. Touchstream Established Google's Use of the Claimed "Server System."

There was more than substantial evidence at trial to support the jury's verdict that the "server system" limitations were met. Through its technical expert, Touchstream identified three components in Google's "server system": the Receiver SDK, Cast Services on the device, and Cast Services in the cloud. Tr. 401:6-17, 430:1-24, 434:9-:435:2, 439:17-440:7, 464:10-18; *see* JTX 187 at 10, JTX 116, JTX 118. Touchstream did not hand-wave in its identification of Google's server system. Dr. Almeroth consistently identified the "server system" by reference to Google's own documents and his unambiguous testimony and demonstratives at trial.



Ex. A, Almeroth Demonstrative, at 53 (Tr. 430) (identifying "server system" in green)

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Google responded by disputing whether the identified components are "servers" and contesting what a "server" is. The jury considered and rejected these arguments. The "court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Taylor-Travis v. Jackson State University*, 984 F.3d 1107, 1112 (5th Cir. 2021).

For instance, Google challenged Touchstream's mapping of various "services" to the claimed "server" components, contending that its architecture did not include servers. But its own corporate witness undid this strategy in a telling admission:

> "Q. And so Google refers to both of these things, both on the device and in the cloud, as Cast service, correct?
>
> A. We generally do not refer to them as Cast service as the same thing. The Cast services or servers -- *services and servers are generally used interchangeably at Google*. 'Cast service' means system service, which is a very particular computer science term that means something that is always running on a physical device in an operating system."

Tr. 885:14-20 (emphasis added). Consistent with this admission acknowledging that Google's "service" modules constitute "servers," Dr. Almeroth explained why the components he identified constitute the claimed "server system" when applying a plain-and-ordinary meaning, and Dr. Almeroth further explained how this "server system" interacts with the other claimed components to perform the claim steps implicating the "server system." Tr. 398:11-23, 401-404, 423:10-426:10, 430:4-24, 431:6-432:20, 434:12-435:2, 439:17-440:7, 451-453.

Google's motion also turns back to its "peer-to-peer" distraction, claiming "unrebutted" testimony shows Google does not use a server because Chromecast is a "peer-to-peer" architecture. Mot. at 7. Far from being "unrebutted," this theory was rebutted by the testimony of Google's own witnesses. For instance, Mr. Van Der Staay testified as follows: "Q. Peer-to-peer communications can be accomplished using servers, correct? A. ***Servers are one way that you can create a peer-***

to-peer connection. Yes." Tr. 882:6-9 (testimony of Mr. Van Der Staay); *see also* Tr. 750:6-9 (deposition testimony of Mr. Bakar). That its own witnesses could not toe the corporate line demonstrates Google's "peer-to-peer" position was untenable.

It is thus unpersuasive for Google to accuse Touchstream of "handwaving" with respect to the term "server." Mot. At 8. Google complains that the "mDNS server," "MDx server," "Orbit server," or "DIAL server" "did not have anything to do with the functionality of the claimed server system." *Id.* This is not the case. The MDx and Orbit server components are involved in practicing the method claims in the "DIAL / MDx scenario" as detailed by Dr. Almeroth. Tr. 464:10-18 (referencing JTX 116 and JTX 118 detailing the MDx / Orbit server). As to the mDNS and DIAL components, Touchstream never claimed they were the accused server system. Rather, Touchstream used the existence of those server components to impeach Google's witnesses and to show that their testimony contradicted Google's own internal documents. *See* Tr. 235:4-6; 1035:21-1037:21.

In short, Touchstream, through its expert, applied the Court's claim construction guidance and identified Google's "server system" components as required by the claims. This identification was clear and consistent, and there was more than enough evidence for a reasonable jury to find that Google infringes.

B. Google's Divided Infringement Arguments Fail.

Google's attempt to upend the verdict based on alleged failures to prove divided infringement should also be denied. First, Touchstream presented more than sufficient evidence to establish that Google practices each of the steps of the asserted claims. Second, to the extent the jury may have found that Google did not practice each step of the claims, it was properly instructed with respect to what is required for direct infringement involving the acts of multiple parties. Dkt.

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246, at 26. Here, the Court should presume that the jury found in favor of Touchstream that Google practiced each of the steps of the claims, and there is substantial evidence to support such a finding. *Sibia Neurosciences, Inc. v. Cadus Pharmaceutical Corp.*, 225 F.3d 1349, 1354 (Fed. Cir. 2000); *Taylor-Travis v. Jackson State University*, 984 F.3d 1107, 1112 (5th Cir. 2021).

1. The Media Player is Not Responsible for Performing Any of the Claimed Method Steps.

Google argues "the alleged infringement requires actions and components provided by third parties," citing the "media player" claim element. Mot. at 9. While Google's cast ecosystem includes third party media players, the asserted claims do not include any claim steps performed by those media players. Rather, the evidence presented at trial demonstrates that Google performs each of the claimed method steps, including steps involving the media players. For instance, Google's motion notes the claimed "server system" must "identify[]" "programing code . . . for controlling presentation of the content," and the "content presentation device" must "use[]" a "particular media player to execute the programing code." Mot. at 9. As written, these claim steps are performed by the claimed "server system" and "content presentation device," components Dr. Almeroth mapped to <u>components provided by Google</u>. Tr. 423:10-426:10 (describing personal computing device, content presentation device, and server system), 451:19-454:10 (Dr. Almeroth explaining to the jury that Google's Receiver SDK performs the claim steps of "identifying programming code"); JTX 187.

Instead of disputing Touchstream's technical evidence regarding the functionality of Google's own components or Dr. Almeroth's mapping of the claim steps to those components, Google now attempts to muddy the water by arguing for non-infringement on the basis of customizations of the "receiver SDK" by third parties. Mot. at 10. Google argues that, because

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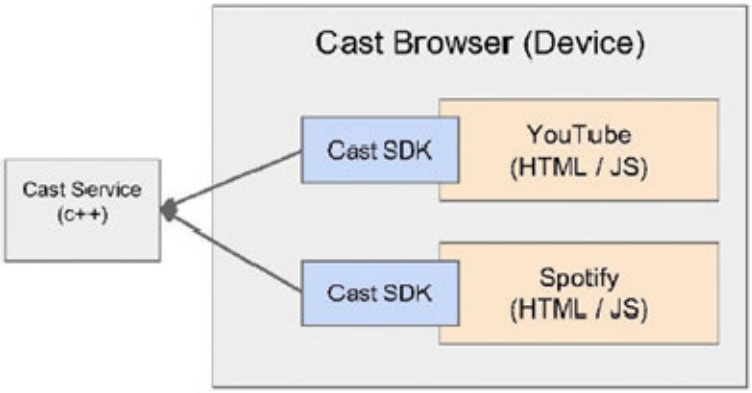
certain apps do not "use all of the SDK," Google does not infringe. *Id.* Google's argument here, at best, relies on disputed issues of fact that the jury resolved in Touchstream's favor.

Google's argument centers on Mr. Van Der Stay's testimony that the receiver SDK "is optional." Mot. at 10. This testimony, however, contradicts Mr. Van Der Stay's previous testimony where he admitted that, for the apps to use "*any*" cast messages, they "*have* to use the cast SDK." Tr. 219:4-16 ("in order for you *to actually use any of the, like, received messages from cast*, like what we've been talking about, or be able to report information back to the cast ecosystem about what you're actually doing, *you have to use the cast SDK*."). Google documents also confirm the mandatory nature of using the SDK. *See* JTX 187 at 8 (stating Receiver SDK is necessary for the media player ("Partner App") to communicate with other components). This is illustrated by the below figure from Google's document (JTX 187). As shown, the receiver cast SDK provides the *only* path between the apps (*e.g.*, YouTube and Spotify) and the cast services.



JTX 187, at 30

Based on this testimony and documentation, Dr. Almeroth explained that the receiver SDK acts as the "bridge" or "glue" enabling communication between the apps and Google's cast services. Tr. 430:15-18; 452:22-23. Dr. Almeroth further explained it is the receiver SDK that

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allows for the handling of casting functions, including the ability to "play" the video, as illustrated by the below demonstrative.

'289 Claim 1

1. A method of controlling presentation of content on a content presentation device that loads any one of a plurality of different media players, the method comprising:

receiving, in a server system, one or more messages from a personal computing device that is separate from the server system and separate from the content presentation device, wherein the one or more messages, taken together, (i) include information associated with a unique identification code assigned to the content presentation device, (ii) specify a file to be acted upon, (iii) identify a particular media player for playing content from the specified file wherein the media player is a computer application operable to present content and control presentation of the content, (iv) identify a location of the particular media player, and (v) include an action control command for presentation of the content on the content presentation device by the particular media player, the action control command being independent of the particular media player,

using the information associated with the unique identification code to store a record establishing an association between the personal computing device and the content presentation device; and

identifying, by the server system, programming code corresponding to the action control command, wherein the programming code is for controlling presentation of the content by the content presentation device using the particular media player,

wherein, based on information received or retrieved from the server system, the content presentation device uses the particular media player to execute the programming code with respect to the file.

Micah Rupersburg
Senior Engineering Manager
Dep. II Tr. 52:11-21

Cast v2
MDx
Open Cast

Q. What purpose does the receiver SDK serve on a cast-enabled device?

A. **It provides what I would describe as glue from Cast messages into the actual application, so that the applications don't have to understand the Cast protocol, and, instead, they talk through a JavaScript API and/or through the HTML API provided by the browser.**

Q. Does the receiver SDK provide the ability to handle media messages like Play and Seek?

A. **Yes.**

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Ex. A. Almeroth Demonstrative, at 76 (Trial Tr. 451-453)

Thus, notwithstanding any customizations provided by third parties, the evidence demonstrates that the receiver SDK enables the handling of the messages (*e.g.*, a play command) from the applications, and Dr. Almeroth was clear that this SDK software is provided by Google, not the third party. Tr. 551:6-16 ("Q. Who provides the software that is receiver SDK? A. That's Google."); *see also* Tr. 547:5-548:11.[1] Based on the evidence presented at trial, the jury was more than justified in rejecting Google's customization arguments and finding that Google performs each of the claim steps, including the steps involving third-party media players.

[1] Far from "ignoring" third parties customizing applications, Dr. Almeroth showed the exact lines of Google's Receiver SDK code doing the identification of programming code, including when those commands are customized. Trial Tr. 455:9-457:17. For example, Dr. Almeroth explained that i[redacted] *Id.* [redacted] *Id.*

[redacted]

2. Users Do Not Perform the Claim Step of Sending Messages.

Google also incorrectly asserts that end-users must perform claim limitations for the patents to be infringed. Mot. at 11-12. The claims do not contain any user-performed tasks, and Google ignores a key tenet of patent law: the claims govern infringement, not the specification.

Specifically, Google argues it does not infringe because it does not send messages to a server system. But the claims only require that the messages are received in the server system. See *id*. (quoting claim language requiring "receiving in a server system, one or more messages from a personal computing device . . ."). Google does not argue that there was insufficient evidence to show that messages are received by Google. Thus, the Court should deny Google's motion.

In its motion, Google conflates what is required by the claims with what is described in the specification: just because casting generally occurs after a user presses a button does mean that such user actions should be read into the claims. It is well-settled that "[i]nfringement arises when all of the steps of a claimed method are performed, whether or not the infringer also performs additional steps." *Smith & Nephew, Inc. v. Ethicon, Inc.*, 276 F.3d 1304, 1311 (Fed. Cir. 2001). Indeed, Touchstream's claim were drafted to require that the claimed act of "receiving" be performed "in a server system," not through the performance of some "additional step" by the user or by some other component.

Google also tried and failed to make this argument to the jury as it cross examined Dr. Almeroth: "Q. Okay. And Google provides software and devices, right? A. They do. Q. All right. When users -- but it's users who perform that method, right? A. No." Trial Tr. 503:17-22. The jury reasonably chose to credit the testimony of Dr. Almeroth—in light of the claim's actual requirements—to find that Google performs each step of the claimed methods.

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3. Device Manufacturers Do Not Perform Claim Steps.

Google argues, in a brief paragraph devoid of authority, that Touchstream failed to prove direction and control of hardware manufacturers. Mot. at 13. Here, Touchstream introduced significant volumes of evidence detailing how Google's software, acting on all accused hardware devices, controls casting. JTX 203, Trial Tr. 443-446, 453-457. This is not controverted by the existence of third parties manufacturing some machines in the cast ecosystem because it is still Google's software performing the claim limitations. *TQP Development, LLC v. Intuit Inc.*, 2014 WL 2809841, *12-*14 (E.D. Tex. 2014) (Bryson, J., sitting by designation)). Google's half-page argument provides no basis for disturbing the jury's verdict.

C. Substantial Evidence Supports the Jury's Finding of Infringement of Each and Every Claim of the Asserted Patents.

1. Substantial Evidence Showed Google's Receiver SDK is a Server Component that Performs the Claimed Steps.

As discussed above, the Receiver SDK performs the relevant steps of the method claims, and Google fails to identify any claim step not performed by Google. *Supra* Section B.1. While developers may choose to use only a portion of the features of the Receiver SDK, they still must use the core infringing features of the Receiver SDK such as "play" and "pause" control commands, and the Receiver SDK provides the only path or bridge between the apps (e.g., YouTube and Spotify) and the cast services. See JTX 187 at 30; Trial Tr. 430:15018; 452:22-23. As Dr. Almeroth explained in detail, Google's Receiver SDK is the component that performs the relevant claim step here. *Supra* Section B.1. The jury credited the detailed record and resolved the dispute in Touchstream's favor.

2. Substantial Evidence Supports the Jury's Finding that the App ID Identifies a Location of a Media Player.

Google's argument that the Cast App ID does not "identify a location of the particular

media player" asks the Court to dispose of the jury's credibility determinations and substitute Google's own determinations in their stead. Not only is this a disputed fact issue, but Google's shaky testimony on the subject was easily disregarded.

Dr. Almeroth explained that the App ID identifies the location of a media player in the app load and launch messages. See Tr. at 438:4-439:2, 447:13-448:7, 522:16-523:1, 526:12-528:5. Google's contention that "[t]he only evidence regarding the Cast App ID was that it is merely a number and does not itself identify a location" is incorrect. Mot. at 14. Dr. Almeroth testified the App ID identifies a location while Mr. Van Der Staay and Dr. Mayer Patel claimed—at trial—it does not. *Compare* Tr. at 438:4-439:2, 447:13-448:7, 522:16-523:1, 526:12-528:5 *with* Mot. at 14-15. Google's witnesses, however, changed their position on this very point. In his deposition testimony (which was played to the jury), Mr. Van Der Staay testified that the Chromecast device uses the "app identifier" to locate and load the correct application. Tr. 199:14-200:14 (Q. And if it is, then the receiver will look up to figure out the URL that contains the HTML application associated with that application ID; is that correct? A. Yes."); *see also* 225:16-226:15. Moreover, Google's expert Dr. Mayer-Patel was impeached on this point and admitted that he previously testified during his deposition that the App Id is used to identify the location of an application. Tr. 1041:1- 1043:15 ("And you would agree that using that app ID, the cast device can -- can locate the URL for the application, correct? A. The cast device finds the URL for the receiver application identified by the app ID. Yes. That is correct.").

In light of this conflicting testimony, the jury was free to credit the testimony of Dr. Almeroth over the trial testimony of Mr. Van Der Staay and Dr. Mayer-Patel. Again, Dr. Almeroth testified that Google's "App ID" identifies the location of a media player. Tr. 437:20-439:2, 522:16-523:1, 526:12-528:5. Given the unreliability of Mr. Van Der Staay and Dr. Mayer-Patel,

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the jury was well within its purview to credit Dr. Almeroth's reasoned explanation over the conflicting assertions offered by Google's witnesses. "[W]ith conflicting expert testimony before it, the jury [is] free to make credibility determinations and believe the witness it considers more trustworthy." *Apple Inc. v. Samsung Elecs. Co.*, Ltd, 839 F.3d 1034, 1062 (Fed. Cir. 2016) (en banc). Thus, when "'draw[ing] all reasonable inferences in the light most favorable to the verdict,'" the jury's determination must stand. *See Packet Intelligence LLC v. NetScout Sys., Inc.*, 965 F.3d 1299, 1305 (Fed. Cir. 2020).

Google also argues that that Touchstream's infringement theory fails because, according to Google, the accused "content presentation device" identifies the location of the media player. Mot. at 15. In making this argument, Google again ignores the claims' actual requirements. The claims require "receiving, in a server system, one or more messages from a personal communication device . . . [that] identif[ies] a location of a particular media player." '289 Pat, 11:25-36. Dr. Almeroth testified that the App ID identifies the location of a particular media player and that the App ID is sent from a personal communication device to a Google server. Tr. 437:20-439:2, 526:12-528:5. While Google challenges whether an App ID identifies a location (as discussed), it does not dispute Dr. Almeroth's testimony regarding the sending of a message containing the App ID from user's device to a Google server. *Id*. This testimony directly addresses the claims' actual requirements and is more than sufficient to support the jury's verdict.

In sum, Google made its App ID argument to the jury, Touchstream rebutted it, and Google lost. *See* Tr. 526:12-528:5 (Dr. Almeroth making clear App ID identifies a location). The jury was reasonable to credit Dr. Almeroth and Google's own witnesses and find App ID identifies a location of a media player. Tr. 199:14-200:14, 225:16-226:15, 438:4-439:2, 447:13-448:7, 522:16-523:1, 526:12-528:5.

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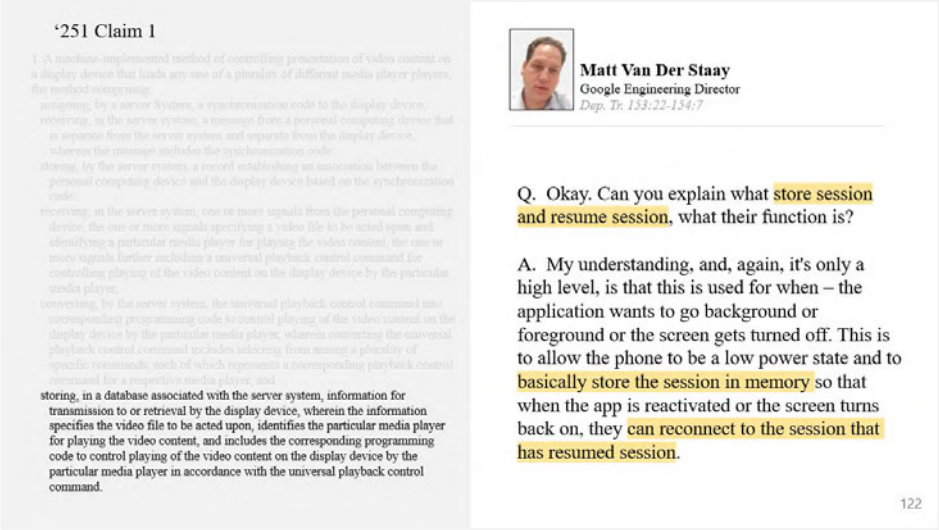
3. Substantial Evidence Supports the Jury's Finding that Google Performs the "Storing" Limitation.

Touchstream presented evidence at trial that Google products store session information, including the associated code, in a database associated with the server system, as required by the limitations of claim 1 of the '251 Patent. As Dr. Almeroth explained, the "store session" and "resume session" functions of the Cast products allow a mobile device to retrieve every piece of context from a prior viewing session. Tr. 450:19-451:13. In other words, a user can close out of the application completely, and when they return to it, it returns its state to the way it was before. *Id*. The application remembers what video was being played, the code needed to play it, and what media player it was on. Tr. 484:3-486:1. Google's final non-infringement argument fails in light of this evidence.

As illustrated by the below demonstrative from Dr. Almeroth's direct, Google achieves this by way of storing information on the mobile device, which is sent to the receiver device to re-initialize the viewing session. *Id*.



Ex. A Almeroth's Demonstrative, at 122 (Tr. 484-485) (referencing Mr. Van Der Staay deposition)

Google claims its "unrebutted" testimony shows this process does not store the required programming code but merely stores a "session identifier." Mot. at 16-17. Not so. As illustrated

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by the above graphic, Mr. Van Der Staay testified during his deposition that Google stores the entire "session in memory," not merely some identifier. Tr. 210:9-19 (Mr. Van Der Staay explaining "store session" stores information when the application is turned off). Dr. Almeroth relied on this testimony and his own analysis to conclude that the server system stores the entire session in memory (including the associated code) and transmits that session (including the code) to the display device so that the session can be reconnected and resumed on the user's device. 484:3-486:1. Dr. Almeroth's testimony and the cited evidence from Google constitute substantial evidence on which the jury could (and did) rely. Just like the other factual disputes at trial, the jury reasonably relied on the evidence to find infringement.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE CLAIMS ARE NOT INVALID

Google raises two issues regarding invalidity: it argues the jury could not possibly have found Mr. Strober conceived of his invention in October of 2010, and it could not possibly have found his patents to be valid. The Court must draw all reasonable inferences in favor of Touchstream, presuming all factual disputes were decided in Touchstream's favor. The "factual underpinnings of the legal conclusion of nonobviousness that the jury presumptively resolved in favor of [Touchstream]" should be left undisturbed where "substantial evidence supported them." *Sibia Neurosciences*, 225 F.3d at 1360.

As an initial matter, Google's motion attempts to poke holes in the jury's finding without addressing all the multiple, independent reasons for rejecting Google's prior art theories:

- There was insufficient evidence that GTS was prior art because the launch date was not proven—Dr. Mayer-Patel relied on Mr. Levai's testimony but ignored Mr. Levai did not have personal knowledge of GTS until after July 2011 (Tr. 904:4-9, 969:2-14);

- Google's attempt to rely on GTS as prior art also fails because Dr. Mayer-Patel relied on evidence of confidential operations that were not evident to the public. There was no evidence establishing public knowledge or that public use disclosed the features of the

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claims (Tr. 990:15 *et. seq*.);

- The "Google TV System" GTS was also not prior art to the asserted patents given Mr. Strober's earlier conception and diligence to a reduction to practice (Tr. 1046:19-1047:16, JTX 1 (dated November 9th, 2010), JTX 21 (dated November 8th, 2016), JTX 51);

- The proposed GTS was, in reality, multiple discrete systems cobbled together by Google's expert and was not a coherent prior art system that actually operated in accordance with any asserted claim (Tr. 1046:11-18, 1050:22-1051:11, 1221:8-1222:8, 1232:6-1234:10);

- Even when imagined as a single system, GTS was missing numerous claim elements from each asserted claim (Tr. 1226:5-1227:9, 1228:18-1229:20, 1235:4-1236:7);

- Muthukumarasamy did not fix the problems with GTS (Tr. 1236:23-1238:25);

- There was no motivation to combine the GTS and Muthukumarasamy references, and it would not have been obvious to do so (Tr. 1240:12-19, 1241:13-1243:10, 1243:14-1245:10, 1245:11-1246:5).

The jury could have relied on any one of these grounds to find the patents not invalid. While Google's failure to address the myriad problems with its GTS prior art theory dooms its request for JMOL on invalidity, the two arguments advanced in its motion both fail on their merits.

As to the priority dispute, the jury could have easily found for Touchstream. The Touchstream patents issued from applications filed on June 10, 2011, which claim priority to a provisional application filed on April 21, 2011, as well as an alleged date of conception in October of 2010. Mot. At 18. At trial, Google attempted to prove that GTS was prior art by relying on the testimony of a single fact witness, Mr. Janos Levai. Tr. 891–903. Mr. Levai, however, did not start his employment at Google until July 2011, ***after*** the Touchstream's April 2011 priority date (and June 2011 filing date), and he admitted he did not have personal knowledge of the Google TV projects before July 2011. *Id*. at 904. ("Q. Do you personally know what was happening with those projects prior to July 2011, from your personal knowledge? A. No."). As Google's only prior art fact witness admitted a lack of personal knowledge of the alleged prior art until after Touchstream's priority date, the jury was more than justified in discrediting Mr. Levai's testimony

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and finding that Google failed to meet its burden of establishing GTS system as prior art to Touchstream's patent filings. *Jiaxing Super Lighting Electric Appliance Co. v. CH Lighting Co.*, 6:20-CV-00018-ADA, 2023 WL 2415281, at *14-15 (W.D. Tex. 2023); *see also* Tr. 1046:19-1047:15, 1051:9-11 (Dr. Mayer-Patel admitting he relied on Mr. Levai's testimony and had no personal knowledge of GTS either).

While Google's failure to establish GTS as prior art based on the April 2011 priority date is dispositive of its request for JMOL of invalidity, the jury also would have been justified in finding that Touchstream was entitled to an October 2010 date of conception based the documentary evidence and inventor testimony. The named inventor, Mr. Strober, testified that he built his initial prototype in October of 2010. Tr. 89:21-25. He described the process of reduction to practice through that October and November of 2010. Tr. 90:1-91:8. As corroboration, he provided 5 separate pieces of source code and a planning document, which he verified as his materials from that time. JTX 218, JTX 226, JTX 228, JTX 254, JTX 255. Juries may rely on inventor testimony corroborated by documents to find conception. *Stamps.com Inc. v. Endicia, Inc.*, 437 F. App'x 897, 908 (Fed. Cir. 2011). Corroboration of inventor testimony can be done through documents and is reviewed under a "rule of reason." *Medtronic, Inc. v. Teleflex Innovations S.À.R.L.*, 68 F.4th 1298, 1306 (Fed. Cir. 2023). Under this standard, the evidence supports an October 2010 conception, and Google's motion fails for this additional reason.

Google also claims it is entitled to JMOL because the asserted claims are obvious, arguing that Touchstream failed to rebut Google's obviousness evidence. Mot. at 19-20. Here, Google argues that it "showed obviousness using a plurality of media players." *Id*. at 20. But Touchstream made clear at trial that the alleged GTS system only worked with one media player: YouTube. Tr. 1223:12-1224:18. Google added window-dressing by pointing to Google TV's other applications,

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but those applications lacked the key remote-control features of the asserted claims. Tr. 1225:22-1227:14. As Touchstream's expert explained, the "GTS" system, as cobbled together by Google's expert, did not operate in the claimed manner (*see id.*), and the jury easily rejected Google's theory.

Google alternatively suggested "GTS" in combination with Muthukumarasamy rendered the asserted claims obvious, but this combination failed to plug the massive holes in the "GTS" system. Here Google assumes the jury would accept its fictitious GTS system and moved on to deciding how this combination would have disclosed other limitations. Tr. 1237:10-1238:25. When Dr. Almeroth was asked about this, he explained that the combination of "GTS" and Muthukumarasamy does not teach these types of remote controls with multiple media players. Tr. 1048:19-25. Further, Dr. Almeroth also explained that Google's expert, Dr. Mayer-Patel, relied on hindsight bias to further build a Frankenstein prior art system. Tr. 1240:12-19, 1241:17-1242:25. As the jury heard, "GTS" and Muthukumarasamy systems were vastly different, and Dr. Almeroth testified a person of ordinary skill in the art would not have combined them. Tr. 1243:14-1246:5. Tr. 1245:11-1246:5. Again, the jury was justified in crediting this testimony and rejecting Google's invalidity defenses.

Having advanced obviousness theories that plainly suffer numerous legal and factual flaws, Google is not entitled to JMOL of invalidity.

V. CONCLUSION

Touchstream respectfully asks that Google's motion for JMOL be denied.

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Date: October 18, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via electronic mail on October 18, 2023. I also certify that all counsel of record who have consented to electronic service are being served with a notice of filing of this document, under seal, pursuant to L.R. CV-5(a)(7) on October 18, 2023.

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