

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

GREE, INC.,

Plaintiff,

v.

SUPERCELL OY,

Defendant.

§ The Honorable Rodney Gilstrap
§
§
§ Civil Action No. 2:19-cv-00311-JRG
§
§
§ JURY TRIAL DEMANDED
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**DEFENDANT SUPERCELL OY’S INVALIDITY CONTENTIONS
AND DISCLOSURES UNDER LOCAL PATENT RULES 3-3 AND 3-4**

Pursuant to Patent Rules 3-3 and 3-4, the Court’s Docket Control Order (Dkt. No. 31), and the Court’s Discovery Order (Dkt. No. 30), Defendant Supercell Oy (“Supercell” or “Defendant”) serve these Preliminary Invalidity Contentions (“Invalidity Contentions”) addressing how claims 1 – 11 of U.S. Patent No. 9,079,107 (“the ’107 Patent”) and claims 1 – 7 of U.S. Patent No. 9,561,439 (“the ’439 Patent”) (collectively referred to as the “Asserted Patents”) are invalid.

Supercell’s discovery and investigation in this lawsuit are ongoing, and therefore, Supercell reserves the right to revise, amend, and/or supplement these Preliminary Invalidity Contentions as discovery progresses and as it discovers additional information.

I. RESERVATIONS AND OBJECTIONS

A. General Reservations

Pursuant to P.R. 3-6, Supercell reserves the right to amend or supplement these Preliminary Invalidity Contentions should GREE: (1) amend its P.R. 3-1 or 3-2 disclosures, including but not limited to amending such disclosures based on GREE’s review and analysis of source code made

available by Supercell; or (2) at trial, in a hearing, or during a deposition, rely upon any information that it failed to identify in its P.R. 3-1 and 3-2 disclosures. Supercell also reserves the right to amend or supplement these Preliminary Invalidity Contentions in accordance with Paragraph 3(a) of the Court's Discovery Order. Supercell provides the disclosures below, as well as the accompanying production of documents, in compliance with P.R. 3-3 and 3-4.

The information provided should not be deemed an admission regarding the scope of any claims or the proper construction of those claims or any terms contained therein. Supercell's claim construction disclosures will be provided under P.R. 4 as required by the Court's Docket Control Order. Nothing contained in these Preliminary Invalidity Contentions should be understood or deemed to be an express or implied admission or contention with respect to the proper construction of any terms in an asserted claim, or with respect to the alleged infringement of that claim.

Nothing in these disclosures should be treated as an admission that Supercell is obligated to produce documentation not under its custody or control, or that can be obtained from some other source that is more convenient, less burdensome and/or less expensive, or for which the burden or expense outweighs its likely benefit. Supercell expressly reserves the right to revise, amend, and/or supplement its disclosures and document production should additional documentation become available.

B. GREE's Deficient Infringement Contentions

Supercell notes that GREE's Infringement Contentions and related disclosures are deficient in that they fail to comply with P.R. 3-1 and 3-2 because they fail to give adequate notice regarding the details of GREE's infringement theories. The lack of detail and deficiencies contained in GREE's Infringement Contentions have prejudiced Supercell's ability to prepare

these Preliminary Invalidity Contentions, including forcing Supercell to speculate as to GREE's actual position(s) on Supercell's alleged infringement and the meaning of various claim terms.

The exhibit attached to the cover pleading purporting to disclose GREE's infringement positions also fails to put Supercell on adequate notice of GREE's positions regarding the alleged infringement of the Asserted Claims and/or Asserted Patents by Supercell's products and/or services. The exhibit is comprised of vague conclusions that fail to identify "specifically where each element of each asserted claim is found within each Accused Instrumentality" as required by P.R. 3-1(c).

Supercell's Invalidity Contentions are based on its present understanding of the Asserted Claims and GREE's apparent positions as to the scope of the Asserted Claims as applied in its P.R. 3-1 disclosures. Supercell's Invalidity Contentions (including the attached invalidity claim charts) reflect, to the extent possible, its best understanding as to GREE's potential alternative or evolving positions on claim construction and scope. Supercell reserves the right to revise, amend, and/or supplement these Preliminary Invalidity Contentions and/or its P.R. 3-4 disclosures should GREE amend its P.R. 3-1 disclosures, including but not limited to amending such disclosures based on GREE's review and analysis of source code made available by Supercell, or attempt to rely on any information that it failed to provide in its P.R. 3-1 and 3-2 disclosures.

C. Asserted Claims

GREE purports to assert the following claims against Supercell from the Asserted Patents: claims 1 – 11 of the '107 Patent and claims 1 – 7 of the '439 Patent. These Preliminary Invalidity Contentions address only the Asserted Claims. Supercell reserves the right to supplement these contentions if GREE asserts infringement of any claim other than the Asserted Claims.

GREE, however, has failed to comply with its obligation to provide a chart identifying specifically where each element of each asserted claim is found within each Accused

Instrumentality under P.L.R. 3-1(c). Where GREE has failed to provide such a chart and identification, Supercell has deferred providing invalidity disclosures. Should GREE seek to amend its infringement contentions to properly assert these claims, Supercell reserves the right to amend its invalidity contentions in response. These preliminary infringement contentions, thus, address only the Asserted Claims, which have been asserted in compliance with the Patent Local Rules. Supercell reserves the right to supplement these contentions if GREE asserts infringement of any claim other than the Asserted Claims.

D. Ongoing Discovery

Discovery is ongoing, and Supercell's prior art investigation and third-party discovery are as well. As such, Supercell reserves the right to revise, amend, and/or supplement the information provided herein, including identifying, charting, and relying on additional material or references. Supercell further reserves the right to amend, modify, or supplement these Invalidity Contentions to include additional prior art under 35 U.S.C. §§ 102 and/or 103, or assert additional bases of invalidity under 35 U.S.C. §§ 101, 102, 103 and/or 112, as discovery in this action and Supercell's investigation proceeds. In particular, Supercell intends to rely upon additional discovery, including but not limited to third party discovery, which is in its early stages, to obtain additional information regarding prior art games, including the relevant version of the prior art games, declarations and source code.

E. Claim Construction

Without conceding any express or implied claim construction suggested by GREE through its Infringement Contentions, Supercell has attempted to apply the prior art to the Asserted Claims. GREE's application of those constructions are in some instances broader than Supercell's contentions regarding the proper scope of the claims. Should the claims be construed or asserted differently than Supercell's current understanding of the claims, Supercell reserves

the right to modify, amend, or supplement these Preliminary Invalidity Contentions as provided by the Local Rules and the Federal Rules of Civil Procedure.

Supercell's Preliminary Invalidity Contentions should not be construed as a suggestion or admission that GREE's apparent claim constructions are correct. Indeed, in many instances, Supercell objects to and disagrees with the apparent claim constructions GREE has offered in GREE's Infringement Contentions as such constructions (1) are unsupported or contradicted by the intrinsic and extrinsic record relating to the Asserted Patents and applications related thereto, (2) would impermissibly read out one or more limitations of the Asserted Claims, or (3) are otherwise inconsistent with the understanding of a person of ordinary skill in the art. Supercell's Preliminary Invalidity Contentions should not be construed to suggest that any claim term or phrase complies with 35 U.S.C. § 112. Finally, Supercell's Preliminary Invalidity Contentions should not be construed as a suggestion or admission of infringement because Supercell specifically denies that it infringes any Asserted Claim.

Supercell reserves the right to amend or supplement these Preliminary Invalidity Contentions to reflect positions taken by the parties during the claim construction process. Further, Supercell reserves the right to amend or supplement these Preliminary Invalidity Contentions in the event the Court adopts claim constructions different than those anticipated by Supercell. Supercell expressly reserves and does not waive its right to contest any claim constructions, or to take positions during claim construction proceedings or in connection with alleged infringement, that are inconsistent with, or even contradictory to, the positions set forth in these Invalidity Contentions.

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