UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

DROPLETS, INC.,

Plaintiff,

-against-

12 Civ. 2326

E*TRADE FINANCIAL CORPORATION, ET AL.,

Defendants.

x

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGMENT OF THE '745 PATENT AS TO ALL REPRESENTATIVE PRODUCTS.

McMahon, J.:

By using certain pieces of computer code to help people research financial information on their well-known web sites, defendants E*TRADE Financial Corporation, E*TRADE Securities, LLC, E*TRADE Bank, Scottrade, Inc., Scottrade Financial Services, Inc., TD Ameritrade Holding Corporation, and TD Ameritrade, Inc. (collectively, the "Defendants") are alleged to infringe U.S. Patent No. 6,687,745 ("the '745 Patent"), which is owned by plaintiff Droplets.[1]

This decision addresses a defense motion for summary judgment on the issue of non-infringement. The motion was made using a creative but unusual procedure.

[1] Droplets actually has three patents, but only the '745 Patent is at issue on this motion. Patent No. 7,502,838 (the '838 Patent), which was originally part of this case, was invalidated upon reexamination. Litigation regarding Patent No. 8,402,115 (the '115 Patent) was stayed pending the resolution of the instant motion.

After the Court issued its *Markman* decisions,[2] Defendants wrote to Plaintiff and asserted that their accused products did not contain an "interactive link" as that term had been construed by this Court. Droplets had originally asserted that certain bookmarks in Defendants' products constituted the claimed interactive link, but the Court's ruling that "bookmarks" could not be the interactive link required Plaintiff to abandon that theory. Defendants then engaged Plaintiff in discussions to design a streamlined procedure for resolving the issue of infringment (to the extent it could be resolved) on a motion for summary judgment. The procedure called for Droplets to revise its infringement contentions; it did so, identifying four "representative products" that allegedly infringe Independent Claims 1 and 26 of the '745 patent as construed by the Court. Each representative product – Interactive Charting (as represented by TD Ameritrade's system); Screener (as represented by E*TRADE's system); TD Ameritrade's Dock; and Search Suggest (as represented by E*TRADE's system) – contains discrete pieces of JavaScript computer code, which Droplets identified as the "interactive link" claimed in the patent. Defendants moved for summary judgment on the ground that the accused code could not be the "interactive link" because it did not meet two parameters of that term as construed. The parties agreed that if the Court entered summary judgment with respect to any representative product, that ruling would apply to Defendants' products that are not colorably different from that representative product.

The parties further stipulated that fact discovery was not necessary in order to answer the questions raised by the stipulated procedure (*see* Docket #257 at 5), and that the Court could determine whether genuine issues of fact existed by looking solely to expert testimony.

[2] The Court's *Markman* rulings have not been officially reported; they can be found at Docket ## 218 and 242 in the public filings in this case.

The Court so-ordered the stipulated procedure on May 20, 2014. (Docket # 257). A lengthy period of briefing followed.

For the reasons that follow, the motion for a summary judgment of non-infringement is GRANTED as to all representative products.

BACKGROUND[3]

Plaintiff Droplets is a software development corporation organized under the laws of Delaware. (First Amended Complaint, Docket #248 at 1.) Based in Texas, it develops technology for delivering functionally rich applications over the internet, and it owns several patents. (*Id.* at 1-2.) Among them is the '745 patent, which protects "a method designed to provide *interactive links* that will allow the user of an electronic device like a computer (client) to retrieve applications or information that are stored 'remotely' (i.e., somewhere other than on the user's computer) and present them on an end user's device in a manner that is compatible with the parameters of that particular device." (Claim Construction of Oct. 21, 2013, Docket #218 at 2) (emphasis added).

Defendants' motion raises two separate questions relating to Droplets' allegation that the representative products infringe independent Claims 1 and 26 of the '745 Patent.

First, do Defendants' products send "operating environment information" about "hardware capabilities"? That is, do they send information about a client computer's operating system, user interface and hardware capabilities to remote servers? (Docket #218 at 14).

Second, do the pieces of accused code in Defendants' products constitute "interactive links," as that term was defined in the court's two prior *Markman* rulings? An "interactive link is computer code other than a bookmark, cookie, shortcut, hyperlink or Internet address (URL) that

[3] The facts are drawn from the First Amended Complaint and the parties' Rule 56.1 Statements of Undisputed Material Fact (Docket ## 248, 262, 265). Additionally, the Court put a number of written questions to the parties while this opinion was being written, which were answered by letter briefs at Docket Nos. 274 and 275.

(a) retrieves and presents applications and/or information stored at remote locations across the network when selected by an end user; and (b) includes facilities for restoring previous operating states of the application as the application is re-presented at a user's computer. (Docket #218 at 11-12; Docket #242 at 1, 6.)

DISCUSSION

I. Standards Applicable to the Motion

A party is entitled to summary judgment when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addressing a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Whether any disputed issue of fact exists is for the Court to determine. *Balderman v. United States Veterans Admin.*, 870 F. 2d 57, 60 (2d Cir. 1989).

The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the non-moving party must present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson*, 477 U.S. at 248. Finally, the nonmoving party

"must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Industries Co.*, 475 U.S. at 586. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant.

To prove direct infringement, the plaintiff (Droplets) must establish by the preponderance of the evidence that one or more claims of the patent read on the accused device, either literally or under the doctrine of equivalents. *Cross Med. Prods. Inc. v. Medtronic Sofamor Danek*, 424 F. 3d 1293, 1310 (Fed. Cir. 2005).

In order to establish literal infringement, every limitation set forth in a claim must be found in an accused product or process. *Johnston v. IVAC Corp.*, 885 F. 2d 1574, 1577-78 (Fed. Cir. 1989). If the accused product lacks even one claim limitation, the accused infringer is entitled to summary judgment. *Taurus IP, LLC v. Daimler Chrysler Corp.*, 726 F. 3d 1306 (Fed. Cir. 2013).

To establish infringement under the doctrine of equivalents, the patentee must provide particularized testimony linking argument as the insubstantiality of the differences between the claimed invention and the accused device or process, or with respect to the function, way, result test when such evidence is presented to support a finding of infringement. Such evidence must be presented on a limitation by limitation basis. *Network Commerce, Inc., v. Microsoft Corp.*, 422 F. 3d 1353, 1363 (Fed. Cir. 2005).

Droplets proceeds on a theory of literal infringement. (Letter of Feb. 23, 2015, Docket # 274 at 7-8.) While Droplets asserts an alternative theory of infringement by equivalents in its February 23, 2015 letter to the Court, it did not assert any such theory in the revised infringement contentions at issue in this stipulated proceeding. (*See* Defendants' letter of Feb. 25, 2015, Docket #275 at 5.) As far as I am concerned, Droplets agreed that the Court could resolve the issue of

infringement without considering infringement by equivalents, and it is bound by that stipulation. The Federal Circuit has recently held that infringement by equivalents is waived if not included in infringement contentions. *See Teashot LLC v. Green Mountain Coffee Roaster, Inc.*, No. 212-cv-0189, 2014 WL 485876 at *6-7 (D. Colo. Feb. 6, 2014), *aff'd*, --- Fed. App'x. ---, 2015 WL 51237 (Fed. Cir. Jan. 5, 2015) (unpublished).

Determining infringement requires two steps. "First, the claim must be properly construed to determine its scope and meaning. Second, the claim as properly construed must be compared to the accused device or process." *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1332 (Fed. Cir. 2006) (citing *Carroll Touch, Inc. v. Electro Mech. Sys., Inc.*, 15 F.3d 1573, 1576 (Fed.Cir.1993)).

In this case, Droplets alleges that Defendants indirectly infringe the '745 Patent by encouraging end users to practice the patent using the accused products.

Absent direct infringement, there can be no indirect infringement. *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 134 S. Ct. 2111, 2115 (2014).

II. The Parties' 56.1 Statements

Infringement presents a question of fact. *Stryker Corp. v. Zimmer, Inc.*, No. 2013-1668, 2014 WL 7210311, at *4 (Fed. Cir. Dec. 19, 2014).

On a motion for summary judgment, if "a party fails to properly . . . address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2). In this district, in order to assist the court is deciding such motions, the movant must present a Statement of Undisputed Facts, in the form specified in Local Rule 56.1, which includes "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried," supporting each

asserted fact by reference to admissible evidence. Local Civil Rule 56.1(a), (d). The party opposing the motion must submit a counterstatement, in which it must either admit that each asserted fact is undisputed or "specifically controvert[]" the asserted fact by citing to evidence which would be admissible. Local Civil Rule 56.1(b)-(d).

Any fact not controverted in the manner specified by the Rule may be deemed admitted for purposes of the motion. Fed. R. Civ. P. 56(e)(2); Local Civil Rule 56.1(c).

Droplets' Rule 56.1 Statement is deficient in a number of ways. Most important, Droplets tries to "controvert" nearly every fact asserted in Defendants' Local Civil Rule 56.1 Statement ("Defendants' 56.1") that Defendants' claim is supported by the testimony of Droplets' own expert, Dr. David Martin. Droplets responds to each of these assertions of fact by (1) announcing that the fact is "disputed," and (2) explaining that Defendants' assertion "attempt[ed] to paraphrase" Droplets' expert. (*See* Droplets' 56.1 Statement, *passim*).

But saying that a fact is disputed does not make it so, and Rule 56.1 requires a responding non-movant to explain why the fact is in dispute, and to cite the evidence that creates a genuine issue of material fact. Local Civil Rule 56.1(b)-(d). Saying that Defendants "paraphrased" Droplets' expert's testimony does not "controvert" anything, and Droplets does not suggest any way in which the Defendants erroneously, inaccurately or even misleadingly characterized the testimony of its expert.

Let me offer but a single example to explain how deficient and baseless Droplets' effort to "dispute" most of Defendants' factual assertions is.

In assertion 1, Defendants state:

> TD Ameritrade's Interactive Charting accused product allows a user to see price history for a security or investment index in chart form. Ex. 5 at ¶ 26.

Herewith Droplets' Response:

> Disputed. Defendants' statement is only an attempt at paraphrasing Dr. Martin's [Droplets' expert's] declaration and is disputed on that basis. Droplets admits that Dr. Martin said what he said. For instance, Droplets admits that Dr. Martin's declaration states: "TD Ameritrade provides an interactive charting application through its website. The interactive chart allows a user to examine time-series data regarding securities and indices, among other information. In addition, the interactive chart is presented to the user in a way that saves and restores its operating state."
>
> Now exactly what is in dispute?
>
> Absolutely nothing.

The first sentence from Dr. Martin's declaration says, in the sort of incomprehensible way that experts often talk to try to try to make it sound like they know something we mere mortals do not, that TD Ameritrade provides its users with something called an interactive charting application [product] that allows users to examine time-series data regarding securities and indices [price history for a security or investment index]. The only difference between Dr. Martin's actual words and Defendants' "paraphrase" is that the former is far less comprehensible to the lay trier of fact. But Dr. Martin's actual words and Defendants' "paraphrase" say exactly the same thing.

Of course, Dr. Martin also says other things – that "other information" can also be viewed through the interactive charting application, and that TD Ameritrade's interactive chart is presented in a way that saves and restores its operating state. But those additional statements *supplement* the portion of his testimony that TD Ameritrade presents; they do not *contradict* anything that TD Ameritrade has chosen to assert. Put otherwise, what TD Ameritrade asserts is an undisputed statement of fact – there is absolutely no dispute, certainly not from Dr. Martin, that TD Ameritrade has an interactive charting feature that allows a user to see historical pricing information for securities and investment indices in the form of an interactive chart. Whether other information relating to the interactive chart is relevant (the fact that other information can also be displayed in chart form) or disputed (whether the chart is presented in a way that saves and

restores) has absolutely nothing to do with whether there is any dispute about the limited, discrete assertion made by Defendants in their Statement of Fact. In fact, it is manifestly NOT disputed; Droplets admits that Dr. Martin "said what he said" and Defendants' description of what Dr. Martin said is accurate as far as it goes.

Another example: In Statement of Fact 23, Defendants assert:

> A user may view the Dock by opening a browser, navigating to the TD Ameritrade web site, and entering a username and password and pressing Enter on the keyboard or clicking the on-screen Log On button.

To which Droplets responds:

> Disputed. Defendants' statement is only an attempt at paraphrasing Dr. Martin's deposition and video and is disputed on that basis. Droplets admits that Dr. Martin said what he said and that Dr. Martin's video shows what it shows. Droplets admits that TD Ameritrade's dock application is available through TD Ameritrade's website. The dock application may be accessed in numerous ways.

Despite this long-winded response, Droplets never once denies that a user can in fact access TD Ameritrade's Dock application in the manner described in Statement of Fact 23. Perhaps Droplets is correct that there are many other ways to access the application, but that is of no moment. Nothing in the Defendants' asserted Statement of Fact says that the way therein described is the *only* way to access the functionality; Defendants include neither the word "only" nor any synonym therefor in their Statement of Fact 23. Indeed, Defendants are careful to use the word "may," not "must," which suggests that there are indeed other possibilities for accessing the dock application. The only issue raise by the Statement of Undisputed Fact is whether there is any disagreement that one can access the Dock application in the manner set forth in Statement of Fact 23. As to that, there is no dispute.

Every one of the Statements of Undisputed Fact in Defendants' Rule 56.1 Statement identified in the footnote at the end of this sentence is "disputed" by Droplets in exactly the same

manner.[4] In no case, not a single one, does Droplets identify any manner in which Defendants' "paraphrase" (or characterization) of the testimony of its expert is *inaccurate* (as opposed, perhaps, to *incomplete*). And this Court's painstaking comparison of the factual assertions of Defendants with the actual testimony of Dr. Martin reveals that there are no such inaccuracies. The only difference is that Defendants make Dr. Martin's jargon-laden statements comprehensible to a lay reader (like this Court or a jury).

Therefore, every one of the Defendants' Statements of Undisputed Fact listed in footnote 4 is deemed admitted for the purposes of this motion.

However, Droplets correctly notes that a few paragraphs in Defendants' 56.1 statement – specifically, Paragraphs 2, 8, 13, 18, 20, 24, 28 and 30 – are not supported with a citation to admissible evidence. The way the local rule works is simple: unsupported assertions of fact are not deemed admitted and will not be considered on this motion. *See Teamsters*, 426 F.3d at 649.

The Representative Products and Their Associated Code

The four pieces of accused code and their related representative products are:

(1) "chart.js" – relating to TD Ameritrade's "Interactive Charting" product;

(2) "screenerutility.js.package.js" – relating to E*TRADE's "Screener" product;

(3) "tda.js" – relating to TD Ameritrade's "Dock" product; and

(4) "Jquery.autocomplete.ext.js" – relating to E*TRADE's "Search Suggest" product.

These four pieces of JavaScript code are alleged by Droplets to be the "interactive links" of the four representative products for purposes of Claims 1 and 26 in the '745 patent.

[4] The offending portions of Droplets' 56.1 Statement are Paragraphs 1, 3, 4, 6, 7, 12, 14, 15, 16, 19, 22, 23, 27, 29, 32, 33, 34, 35, 36, 37, 40, 41, 44, 50, 53, 54, 58, 60, and 64.

III. Defendants Are Not Entitled to Summary Judgment on the Ground that the Accused Codes are Simply Disclaimed "Internet Shortcuts."

As construed by this Court during the *Markman* phase, the term "interactive link" refers to computer code that both (1) retrieves and present applications and/or information stored at remote locations across the network when it is selected by the end user; and (2) includes facilities for restoring previous operating states of the application as the application is re-presented at a user's computer.

All four representative products contain pieces of code that Droplets argues constitute "interactive links." In each product, this code is written in JavaScript.

Defendants argue that none of the identified pieces of code can be an "interactive link" because, during prosecution, Droplets disclaimed "internet shortcuts" as being "interactive links." JavaScript, defendants say, is nothing more than an "internet shortcut," because, at a "high level" (whatever that means), it instructs a web browser to do something.

The gist of the argument is that anything that instructs a web browser to do something falls within the definition of "internet shortcut," and is thus disclaimed. Nothing in the record suggests that this argument is anything other than an overreach, and the Court rejects it.

In doing so, I reach a question of claim construction not raised during the *Markman* phase of this case.

It is inappropriate for parties to seek *reconsideration* of settled claim constructions in their summary judgment briefing. *See, e.g.*, *Safoco, Inc. v. Cameron Int'l Corp.*, H-05-0739, 2009 U.S. Dist. LEXIS 66187 at *21-29, *93 n.150 (S.D. Tex. Jul. 31, 2009); *Ghaly v. Hasbro, Inc.*, 97-CV-7037 (DRH), 98-CV-5239 (DRH), 2003 U.S. Dist. LEXIS 25980, at *10-11 (E.D.N.Y. Oct. 28, 2003); *see also Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1332 (Fed. Cir. 2006) (summary judgment should be considered in light of claim construction).

But here, the parties have raised several new and "actual dispute[s] regarding the proper scope of these claims." It is "the court, not the jury, [that] must resolve th[ose] dispute[s]." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008).

The Federal Circuit repeatedly has found that "district courts may engage in a rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves." *Pfizer, Inc. v. Teva Pharm., USA, Inc.*, 429 F.3d 1364, 1377 (Fed. Cir. 2005). Indeed, a court may revisit its constructions even on the eve of trial, when its evolving understanding of the technology so warrants. *See Utah Med. Prods., Inc. v. Graphic Controls Corp.*, 350 F.3d 1376, 1381–82 (Fed. Cir. 2003). While the experts' testimony certainly has enlightened the Court, the claim constructions resolved in this opinion are resolved on the basis of intrinsic evidence alone.

Droplets unquestionably disclaimed "internet shortcuts" as being the "interactive link." But Droplets did not define an "internet shortcut" as all "representations of instructions to perform on an Internet browser."

Defendants argue that the last two sentences of the following paragraph do in fact so define the term "interactive link:"

> Internet shortcuts encapsulate URLs or other location information (Dickman, column 4, line 23-26) and cannot perform the functions of interactive links as claimed. Internet shortcuts contain only URLs. An internet shortcut is used by the operating system to launch a browser to retrieve resources that reside on the Internet at the location of the shortcut (Dickman, column 4, lines 13-18). URLs and other location information are merely location data and do not, e.g., connect one part of a program to another program. *URLs and other information are elements that inform the browser program to locate certain items. Internet shortcuts are not graphical representations of interactive links but are instead representations of instructions to perform on an Internet browser.*

(Docket #260-11 at 27-28)(emphasis added).

Even reading these sentences as broadly as Defendants urge, a "representation" of an instruction to a web browser is not the same thing as the actual "instruction to perform on a web browser" – the "representation" of the instruction is a picture or other abbreviation that can be used to access that instruction without having to type it in every single time (i.e., the representation is a shortcut). Defendants' argument that "instructions to perform on an Internet browser" cannot be "interactive links" thus makes no sense.

Furthermore, "Prosecution history may not be used to infer the intentional narrowing of a claim absent the applicant's clear disavowal of claim coverage." *Superguide Corp. v. DirecTV Enters.*, 358 F.3d 870, 875 (Fed. Cir. 2004). A disclaimer "must be made with reasonable clarity and deliberateness." *Id.*; *see also Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 595 F.3d 1340, 1352 (Fed. Cir. 2010).

Droplets did not either clearly or deliberately disclaim "instructions to perform on a web browser" as being "interactive links." Rather, acting as its own lexicographer, Droplets defined the "internet shortcuts" it was disclaiming as code that "encapsulates URLs or other location information" without in any way "connect[ing] one part of a program to another part." Put otherwise, acting as its own lexicographer, Droplets disclaimed *representations of URLs* (Docket #260-11 at 27 ("Internet shortcuts contain only URLs")), because those representations merely "inform the browser program to locate certain items" without themselves "connecting one part of a program to another part" – and so "cannot perform the functions of interactive links as claimed." (Defendants' Ex. 11 at 27.)

Because I reject Defendants' argument that JavaScript instructions to perform on a web browser were somehow disclaimed during the course of patent prosecution, I also reject Defendants' assertion that they are entitled to summary judgment on that ground.

IV. The Parties' Contentions

Defendants advance essentially identical non-infringement arguments for each representative product, save for an argument unique to Search Suggest discussed at length below.

First, Defendants argue that the representative products do not infringe the '745 Patent because they do not send "operating environment information" to a remote server, as Claim 1 requires.

Second, they argue that the accused code does not fall within Claim 26's definition of an "interactive link" for two separate and independent reasons: (a) the code is not "selected" by the user; and (b) the code does not restore operating state.

I conclude that Defendants are wrong about their first contention, but correct about their second contention. As a result, they are entitled to a summary judgment of non-infringement.

A. The Accused Products Do Send "Operating Environment Information" As That Term Was Defined During Claim Construction

The claimed invention must send "operating environment information" to a remote server. "Operating environment information" is "information about a client computer's operating system, user interface and hardware capabilities." (*See* Claim Construction, Docket #218 at 14.) For purposes of this motion, Defendants contends that the representative products do not meet the third requirement – that is, none of the four representative products sends "information about a client computer's . . . hardware capabilities," to a remote server.

Defendants are incorrect.

This "hardware capabilities" dispute turns on something called a "user-agent header." A user-agent header is a string of code sent with a hypertext transfer protocol (HTTP) request; it conveys information to a server about the entity making the request. It is undisputed that the

accused code's execution causes a "user-agent header" to be sent to Defendants' servers. For purposes of this motion, both parties analyze a particular user-agent header[5] that includes the designation "WOW64."[6]

Droplets asserts, through its expert, that the WOW64 designation communicates that the client computer contains a 64-bit hardware processor rather than a 32-bit processor. (Droplets' 56.1 at ¶¶ 61, 74). In particular, it relies on evidence from non-party Microsoft, whose instructional manual states that "WOW64 is the x86 emulator that allows 32-bit Windows-based applications to run seamlessly on 64-bit Windows." *Id.* Thus, Droplets argues, the "WOW64" designation compels the conclusion that the user has a certain kind of hardware capability: a 64-bit hardware processor, rather than a 32-bit processor. (Droplets' 56.1 at ¶¶ 61, 74). The WOW64 designation therefore – according to Droplets – provides "information about . . . [the] client computer's hardware capabilities."

As a literal matter, Droplets is of course correct. A processor is hardware. Its capacity – the number of bits of information that it can hold – is "information about" the "capabilities" of this particular piece of "hardware." Therefore, conveying the information that the client computer contains a piece of hardware (a processor) with a 64-bit capacity would seem to meet the definition of "conveying information about . . . hardware capabilities."

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[5] According to Dr. Martin, the full string reads: "User-Agent: Mozilla/5.0 (Windows NT 6.1; WOW64) AppleWebKit/537.36 (KHTML, like Gecko) Chrome/32.0.1700.107 Safari/537.36."

[6] At least some computers send user-agent headers containing the WOW64 designation to Defendants' servers when they use the representative products. Dr. Shamos opines that the "WOW64" designation does not appear in all user-agent headers, and that nothing like it appears in those headers where it does not appear. *See* Shamos Decl., Docket # 260-2 at ¶¶ 73-74. However, Defendants' 56.1 Statement does not mention or adopt that position, giving Droplets no chance either to admit or deny it. Nor does Defendants' briefing take the position that the representative products could only infringe where "WOW64" or some equivalent designation is sent to a server. Instead, Defendants devote themselves to arguing "WOW64" never constitutes information about hardware capabilities.

Defendants insist otherwise. Close consideration of their argument does not, however, convince this Court that what is literally true is in fact untrue.

Defendants admit that the WOW64 designation conveys *something* about hardware capabilities; indeed, Droplets admits that the designation signifies that the user is "likely" to have a 64-bit processor. And both experts agree that it is always possible to infer some information about hardware from information about the operating system or browser that runs on that hardware. *See, e.g.*, Ex. 3 at 129-11-132:10; Ex. 9 at 121:10-123:12; Ex. 2 at ¶75.

Defendants contend, however, that inference is not enough; that the WOW64 designation does not provide "information" about hardware capabilities, as required by the '745 Patent, because, in essence, it constitutes circumstantial rather than direct evidence of those capabilities. (Docket #261 at 28). That is, WOW64 provides direct evidence about the software capabilities of the device sending the user-agent header, from which one can infer that the hardware on which the software is running is a 64-bit processor. Information obtained by inference is not, according to Defendants, "information" about computer capabilities that is conveyed to a remote server by the claimed invention.

During claim construction, the Court did not restrict the manner in which the claimed invention could convey information about hardware capabilities. Defendants apparently want the Court to refine the definition of the phrase "information about" to mean "direct evidence of."

While it is perfectly appropriate to engage in "rolling claim construction" as a district court's understanding of complicated technologies evolves, *Jack Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002), Defendants offer no evidence that might support a different technological understanding of the phrase "information about." Their Rule 56.1 statement contains no factual basis for asserting that one skilled in the art would understand

the phrase that way, and they point to no intrinsic evidence requiring such a construction. Furthermore, "information about" is hardly a technological phrase, and this dispute can be resolved as a matter of plain meaning.

In any event, this Court would have a hard time concluding that circumstantial evidence about hardware capabilities was not "information *about* hardware capabilities." As every trial lawyer knows, circumstantial evidence is direct evidence of Fact A (this client is using an operating system that was designed to run on 64-bit processors) from which one can logically infer the existence of Fact B (this client is using a 64-bit processor). The only evidence in the record is that WOW64 permits an application that normally would be run on a 32-bit processor to run on a 64-bit processor. According to Microsoft (which wrote the operating system software), the purpose of the designation is to indicate that the software is designed to be run on processor with a particular capacity – and that capacity is 64 bits. Droplets' expert, Dr. Martin, testified that when WOW64 is present in the user-agent header, it signifies that a 32-bit Windows-based application is running on a 64 bit Windows, and that a client using 64-bit Windows is using a 64-bit processor. (Droplets 56.1 at ¶31.).

Defendants' expert, Dr. Shamos, offers no evidence to the contrary; that is, he offers no evidence that WOW64 can be run on a processor other than a 64-bit processor. All Dr. Shamos says is that WOW64 is "information about the operating system" (which, of course, it is), and that hardware capabilities inferred from information about the operating system cannot qualify as "information about" hardware capabilities, because deriving information about both software and hardware capabilities from a single source would render superfluous the Court's requirement that the invention send a server "information about" *both* software and hardware capabilities. (Shamos Decl. at ¶¶ 74-76.) That is pure *ipse dixit*, and it makes absolutely no sense. Defendants suggest

no reason why information "about" an operating system (i.e., about software capabilities) cannot – as a practical matter – simultaneously convey "information about hardware capabilities." The claim as construed requires only that information about both hardware and software be sent to a remote server; it included no requirement that that information be derived from two separate sources. The claim construction did not address the issue of how that information was to be conveyed. Dr. Shamos' bare and utterly unsupported testimony does not create any genuine issue of material fact.

Defendants' motion for summary judgment of non-infringement on the ground that the accused products fail to send "operating environment information" as construed is denied.[7]

B. The Accused Pieces of Code Do Not Constitute "Interactive Links" As Construed.

I turn now to the second question that Defendants present: whether the accused pieces of code could possibly constitute "interactive links" within the meaning of the '745 Patent.

An "interactive link" has two separate facilities. It "retrieves and presents applications and/or information stored at remote locations across the network when selected by an end user," and it "includes facilities for restoring previous operating states of the application as the application is re-presented at a user's computer." (Docket #218 at 11).

Defendants contend that the JavaScript codes identified by Droplets as the "interactive links" in the representative products meet neither prong of this two-pronged definition because: (1) the JavaScript codes are not "selected by an end user" and (2) the JavaScript codes do not

[7] The parties argue about whether the "operating environment information" limitation applies equally to Claim 1 and Claim 26 of the '745 Patent, with Defendants asserting that it does apply to both and Droplets arguing that it only applies to Claim 1. In view of the ruling just announced in the text, I need not decide that issue.

include *all* the necessary facilities for restoring previous operating states of the application when the application is re-presented at a user's computer (emphasis added).

I asked the parties to answer questions in supplemental filings, using as an exemplar one of the four accused JavaScript codes: charts.js, the code that relates to TD Ameritrade's Interactive Charting product. Since the discussion of charts.js describes the principles that dispose of the "not selected" argument with respect to all four accused representative products, I will address it first.

1. "Chart.js" in the Interactive Charting Product Does Not Constitute an "Interactive Link" Under the '745 Patent Because The User Does Not "Select" It

Interactive Charting allows a TD Ameritrade client to view a chart showing the price of a user-specified financial index or financial product over a user-specified date range. (Defendants' 56.1 at ¶¶ 1, 5). Interactive Charting consists of computer code located both on "client devices" (such as computers, tablets, and smartphones) and on TD Ameritrade's servers. The JavaScript code chart.js, which is the purported interactive link, is one piece of that computer code. (Droplets' 56.1 at ¶ 69). It is identical or nearly identical on every device to which it is downloaded. (Droplets' 56.1 at ¶¶ 10, 78).

Droplets, through its expert Dr. Martin, identifies seven steps that must occur for a user to be able to interact with a chart in Interactive Charting. (Docket #274 at 2-5.)

First, the user visits the TD Ameritrade website.

Second, he or she logs in with a username and password (Defendants' 56.1 at ¶¶ 45-46), at which point a "Research & Ideas" tab becomes visible. (Defendants' 56.1 at ¶ 3). The user hovers a cursor over or clicks on that tab, which in turn presents the user with a drop-down menu of clickable text, including the clickable text "Charts." Defendants assert that "Charts" represents a hyperlink; it is the visual embodiment of, *inter alia*, the location of a file that contains html code. (Defendants' 56.1 at ¶ 40). I have found hyperlinks to be disclaimed. (Docket #242 at 1, 6.)

Droplets does not contest that the user who clicks on "Charts" clicks on the representation of a hyperlink. But, it argues, "Charts" is a representation of *more* than the hyperlink to which it first leads; it represents an entire flurry of activity that clicking on the hyperlink launches automatically, and that automated process is what fetches and, allegedly, requires the accused code. (Droplets' 56.1 at ¶¶ 80, 102.) The accused code itself – according to Droplets – is not a hyperlink, and does not constitute any of the other technologies I have found to be disclaimed, *i.e.* it is not a bookmark, cookie, shortcut, hyperlink, or Internet address (URL)). (*Id.*)

What Droplets argues is that the accused code has been inserted into an automated process for which the Charts hyperlink is a gatekeeper, such that clicking on the "Charts" hyperlink launches an automated process that ultimately invokes the accused code.

This flurry of automated activity begins in the third step. Clicking on the "Charts" hyperlink causes the html code it represents to fetch a web page in the form of HTML code from a remote server, and to deliver that code to the end user's computer, (Defendants' 56.1 at ¶ 40), where it begins to load. (*See* Docket #274, Screenshot at 2.) The page so retrieved does not yet have the functionality of the Interactive Charting product; indeed, no chart will be visible. (*Id.*) It also does not have chart.js. However, the HTML code on the remote server includes an instruction to embed accused code chart.js in the charts web page that ultimately displays a chart to the end user. (Docket #274 at 2.) That instruction allegedly causes the user's web browser to request the chart.js code from a remote web server (generally TD Ameritrade's web server, but possibly some other third party)[8] to send that code to the user's device. (*Id.*; *see also* Droplets' 56.1 at ¶ 70).

[8] Defendants inform the Court that, "depending on the particular action," the relevant server may in fact be that of a third-party vendor. They assure me, however, that the distinction is not relevant for purposes of this motion. *See* Defendants' Letter of Feb. 25, 2015, Docket #275 at 1, n.1.

Fourth, the user's computer receives and downloads chart.js, which then begins to execute. At this point, the user's computer will show that a chart is "loading." (Docket #274, Screenshot at 3.)

Fifth, as chart.js is running on the user's computer's web browser, it creates an "XMLHttpRequest," which asks TD Ameritrade's server to provide information about the specific security and date range last requested by the user. (*Id.*) The XMLHttpRequest not only asks for information about the desired security and date range, but also and at the same time sends a "user-agent header" to the remote server (*id.*; *see also* Droplets 56.1 at ¶ 71), the significance of which was discussed above (*see supra* at 13-17).

Sixth, TD Ameritrade's server receives the XMLHttpRequest that chart.js generated. (Docket #274 at 3.) The server uses chart.js' XMLHttpRequest to retrieve the precise information that will generate a chart meeting the user's specifications from the server's data stores. (*Id.*) The server then transmits the required information back to the user's computer for display. (*Id.* at 4.)

Seventh, the user's computer receives and downloads the information that TD Ameritrade's server sends, and displays that information to the user – thereby "restoring" the user's previous operating state. (*Id.*) What the user now sees is the very chart he or she saw immediately before leaving TD Ameritrade's site the last time.[9]

All of this happens automatically when the end user clicks on the "Charts" hyperlink; that one click sets in motion the automatic multi-step sequence just described, which leads inexorably to the re-display of the last chart seen by the user. No further user action is required beyond the initial user click on the Charts hyperlink. The retrieval, sending and executing of the chart.js code occurs as part of that process. (Droplets 56.1 at ¶ 7).

[9] Droplets identifies additional steps that occur when the user wants to see something new, i.e. specifies new parameters for the information he or she wishes to see in the chart the computer displays. (*See* Docket #274 at 4-5.)

Defendants insist that the accused code "chart.js" cannot be the interactive link because the end user does not "select" chart.js, or any representation of chart.js, but rather selects the hyperlink "charts."

The Court was not asked to construe the verb "select" during the *Markman* phase, though the phrase "in response to a selection of an interactive link" appears in Claim 26. (No variant on the verb "to select" appears in Claim 1). When I wrote the *Markman* decisions, I did not understand the parties to have different understandings of what the verb means. After the *Markman* decisions, it seems that they do.

Defendants argue that "selects," as used in the court's definition of "interactive link," means "clicks on" a graphical or other representation of a link – citing the portion of the *Markman* decision where I described the "selection" of a link as what occurs when an end user "wishes to retrieve data from the Internet and present (display) that data at his own terminal." Docket #218 at 10. The claim term "link" is, in part, defined by selection; "it refers to computer code that, when selected by an end user (generally by 'clicking' on its visual embodiment with a mouse), connects the user to other bits of code." *Id.* at 9-10. Defendants argue that the user never "selects" chart.js because neither the accused code nor any representation (i.e., icon, verbal indicator) that leads directly to that code ever appears on the user's screen to be "selected" (hovered over or clicked on). Rather, the end user's act of clicking on the Charts hyperlink prompts an automated and unchanging process that includes the execution of chart.js in order to provide the functionality (i.e., the chart) the end user seeks.

If "selects" means "clicks on," then Defendants are correct. It is undisputed that the end user clicks on the "Charts" hyperlink. The hyperlink itself cannot be the "interactive link," because hyperlinks were disclaimed as being the "interactive link." *See* Second *Markman* Decision

Construing "Interactive Link" Following Consideration of Extrinsic Evidence, Docket #242 at 1, 6. Nor is the hyperlink a graphical representation of the accused code; rather, it is a graphical representation of a file containing HTML code. That HTML code does not include the JavaScript code charts.js. Instead, execution of the HTML code will eventually lead to the retrieval of the charts.js code from some remote location, and to its execution on the client computer.

Droplets argues that "selects" does not mean "clicks on," but it does not offer a competing definition for the word. Instead, Droplets contends that the end user "selects" the accused code when he clicks on the "Charts" hyperlink because, by so doing, he "selects not only the html code to which it leads directly, but rather the entire sequence of events that includes, *inter alia*, the retrieval and execution of the accused JavaScript." When the user clicks on the "Charts" hyperlink, according to Droplets, what he is "selecting" is not the hyperlink, but the entire sequence of events that follows his click.

Droplets offers the following analogy: when a user presses the "mocha" button on an automatic espresso machine, she triggers a whole series of automated events: grinding beans, adding water, adding milk, adding chocolate, and so forth. This entire process results in the delivery of a beverages known as a "mocha" to the end user. What the end user wanted was not the mocha *button* (which is what she "selected" by pressing it, per Defendants' definition), but the beverage that results at the end of the automated process. Therefore, by pressing the button, she "selects" that entire process.

So too here, Droplets argues: when the end user clicks on the "Charts" hyperlink, what he wants is to see a securities chart. Getting the desired result requires an entire automated sequence of events – including the retrieval of the accused JavaScript from a remote location. By clicking

on the Charts hyperlink, Droplets argues, the end user in fact "selects," not just the end result of the desired chart, but all of the steps in between, including the retrieval and execution of "chart.js."

Droplets does not offer (or, at least, does not point the Court toward) any *evidence* tending to show that one skilled in the art would so understand what it means to "select." There is, however, ample evidence in the record about what *Droplets* understood that verb to mean, *and what it believed those skilled in the art would understand it to mean*, at the time it obtained the '745 Patent. That evidence is found in the patent itself – specifically, throughout the specification and the description of the preferred embodiment. And that evidence – evidence that Droplets is in no position to dispute, because it constitutes an admission by the plaintiff in this action – is entirely supportive of Defendants' assertion that the accused code cannot be the "interactive link" because that code is never "selected" by the user.

Throughout the patent, Droplets uses the verb "selects" or "selected" to mean the intentional physical act of designating a graphical or iconic or even verbal representation of the interactive link on the end user's computer screen. For example, the specification provides that, "Once the interactive link and the graphical representation are downloaded, *the graphical representation may then be selected.*" ('745 Patent at 5:31-33).

Similarly, in the description of the preferred embodiment we find, "The locally installed application may be invoked to execute on the client computer by *selecting the link*, as discussed above..." (*Id.* at 11:48-50); "a droplet handle object incorporated on the banner ad of the delivered informational content may be captured by, for example, *selecting the droplet handle object, and moving (dragging) the handle about the client computer's GUI.*", and "*locally stored links are selected* to invoke and present, on the client computer, functionality provided by droplet-enabled applications (*Id.* at 14:58-61).

Both of these sentences contemplate that the "link" will be "selected" by pressing on its graphical representation, and expressly contemplate the link's being downloaded *before* its graphical representation is "selected" – not *in response to* the selection of the graphical representation. That these references equate selecting with clicking on an icon or other representation (verbal or graphical) of a link that *is already downloaded* to the end user's device cannot be doubted. But as described by Droplets' own expert, "chart.js" is downloaded *after* the user clicks on "Charts."

It is equally clear that these references require that what is physically selected is the "graphical representation" of the link. According to Droplets, a user "selects" a droplet handle (a graphical representation of the interactive link), which he can then move or drag around the client's computer graphical user interface ("GUI"). But a user cannot "move or drag" an HTML file on a client's GUI. Still less can he "move or drag" a remotely stored code that will only be retrieved and downloaded after the HTML code represented by the Charts hyperlink file executes. And still less can be "move or drag" a process! So asserting that the user "selects" the process he unleashes when he clicks on an icon is entirely at variance with what Droplets describes in its own patent.

Other references to "selection" in the patent make it even clearer that "selection" refers to the act of picking a graphical representation of a link off a computer screen, not to picking a process that is thereby set in motion:

"*The icon is selected* by, for example, holding down on a button associated with the pointing device" (*Id.* at 15:2-3);

"The item (link) may be *an icon, an image or a string of text that, when selected*, invokes a droplet-enabled application or retrieves droplet–enabled information from a remote location on a network" (*Id.* at 16: 26-29);

"In one embodiment, the cursor is utilized to initiate a download to the client computer of one of the interactive links in one of two ways. Firstly, and as discussed above with reference to FIGS. 4A-4D, the cursor is positioned above an object representing the link, i.e., the icon, by manipulating the pointing device. *As the icon is selected to initiate the download,* a visual characteristic of the cursor is modified....Secondly, *the icon may be selected by positioning the cursor over the icon using the pointing device, depressing and releasing the button on the pointing device*.... (Id. at 15:24-31).

"As should be appreciated by those of skill in the art, *the graphical representation of the link is selected by, for example, double clicking the representation with the pointing device.* Once selected, the link causes the local operating system to invoke the droplet supporting the droplet-enabled application." (Id. at 17: 35-40).

The reader will readily appreciate that, in every one of these references in the patent itself, Droplets equates "selection" with a physical act that immediately invokes the link: the act of designating something that appears on his screen (picking), by holding down a button (clicking) after positioning a cursor over that something. It is the link (represented by an icon, an image or a string of text) that is "selected" – not the process, though a process may follow the selection of the link. To use Droplets' own formulation, the "selection" of the representation of a link by the user begins a process – "selection" does not "select" that process. Were there any about this, these references make it perfectly clear:

> Once downloaded, *the link (e.g., graphical representation of the link) may be selected to* initiate the communications connection.....

(Id. at 20:9-11). Or this one:

> As generally discussed herein, *a link to droplet-enabled applications and/or information is selected* to invoke a unique instance of the application and/or information stored at a remote location on a network.

Droplets itself uses the verb "selects" over and over, and always to refer to the physical act whereby the end user designates and chooses to navigate via the representation of a particular link. The process that results from the physical act of "double clicking the representation with the pointing device" is "initiated" or "invoked" only *after* the link is "selected" by the end user by clicking on its graphical representation.

Droplets' claim construction brief was consistent with that view. In its claim construction statement, Droplets described a "link" as "an active field that allows user selection and performance of an action upon user selection," and an "interactive link" as a link with some additional features. *See* Docket #206 at 15. In Droplets' brief, the user's selection of the link is what makes it a link in the first place: "A link is text or other data type having actionable features *associated with its selection* . . . When a user selects a link, the user selection is interpreted by the processing device to perform an action based on the link, such as accessing another server on the web." (*Id.* at 18-19) (emphasis added) (internal citation omitted). At another point, Droplets refined "selection" by distinguishing certain prior art: that prior art was merely text – "an inactive file incapable of being selected (*i.e.*, it was not actionable)" (*id.* at 20), thus suggesting that the invention was characterized by an unmediated interaction between the end user and *actionable* code.

The Court's use of the verb "selects" when construing the term "interactive link" in the *Markman* decision was not accidental. It was informed by Droplets' use of the same verb throughout its patent and its claim construction brief. Droplets did not seek reargument after I construed the claim on the ground that I had misused the verb "select," or that I had unduly narrowed the concept of "selection" when I described it as being accomplished by clicking on a visual embodiment of the link with a mouse. Just as Defendants cannot reopen settled claim

construction in response to a summary judgment motion, neither can Droplets; and I do not intend to allow it to undermine the Court's claim construction with a very belated argument – especially when that argument is contradicted over and over again by the contents of the patent itself, and by the patentee's statements in documents filed with the court.[10]

If the contents of the patent itself did not fatally undermine Droplets' suggestion that the end user "selected" the process behind the graphical representation on which it clicked, logic would do so. Droplets lost its argument that it had never disclaimed hyperlinks as being "interactive links." (*See* Docket #242 at 1, 6.) When one clicks on a hyperlink, one also commences an "underlying process" that results in accessing a web page different than the page that was on the screen when the hyperlink was clicked. Droplets' disclaimer of hyperlinking as the "interactive link" would perforce be a nullity if one could draw a distinction between "selecting" the hyperlink's representation on the screen (which is really all an end user can do) and "selecting" the underlying process that is unleashed by that hyperlink.

As for Droplets' clever mocha analogy: it simply does not work. Droplets argues that the customer who presses the mocha button is selecting the process of grinding the beans, frothing the milk and squirting the chocolate. No he is not; he does not want a process, he wants a drink, which is the end product of that process. I rather imagine that the end user who clicks on "charts" also

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[10] Further reinforcing the court's view of this matter is the result of the *inter pares* review of the '745 patent, which was conducted well after this lawsuit was filed. The Patent Office allowed the following new claim:

> 102. The computer processing system as claimed in claim 70, comprising computer program code for:
>
> the *user selecting the graphical representation*; and
>
> in response to the selection, accessing the contents of the file associated with the graphical representation . . . ("745 Patent *Inter Pares* Review at 6:28-31).

Droplets did not alter its use of the verb "selects" in the IPR

wants the end product – the chart – rather than the iconic "button" that he is pressing, but . But the issue is what the user *selects*, not what he *wants to obtain as a result of his selection.*

This Court finds no reference in the '745 patent where Droplets said that the end user "selects" the restored chart that pops up on his screen after he clicks on the hyperlink "Charts." For that matter, I find no reference in the patent in which Droplets said that the user was selecting some underlying process, the details of which are not described and so not disclosed to a reader of the patent. All references to "selection" posit the selection of a link, generally through tapping on its graphical representation. Not a scintilla of evidence in the record suggests that the "Charts" hyperlink is a graphical representation of the code charts.js.

The analogy does not work. Neither does the argument.

I reject Droplets' effort to confuse the issue by suggesting that one skilled in the art would understand that an end user "selects" an entire process rather than an iconic or verbal representation that leads directly to the accused code. Its own specification gives the lie to the argument it now seeks to make; Droplets has quite explicitly told the reader that one skilled in the art would understand what it means to "select" the interactive link in the way Defendants and this court do.

Droplets' Rube-Goldberg analogy fails because it depends on Droplets' failed contention that the end user "selects" the entire process, rather than the link on which he clicks. The claim as construed requires the end user to select the "interactive link;" the user does not "select" charts.js or any graphical representation of charts.js. Therefore, the fact that the retrieval and execution of "charts.js" is (to use Droplets' word) "inserted" into an otherwise disclaimed process (hyperlinking) is of no moment. Droplets cannot get around the fact that, when using Interactive Charting, the user "selects" neither the code that it identifies as the interactive link, nor any

representation of that code. Therefore, *Suntiger, Inc. v. Scientific Research Funding Grp.*, 189 F.3d 1327, 1336 (Fed. Cir. 1999) has no applicability to the analysis that disposes of this case.

There is another reason why the user cannot be said to "select" the accused JavaScript code by pressing on the "Charts" hyperlink: he can't. The JavaScript code is not on his computer to be selected. Only in response to the user's pressing "Charts" is the code charts.js retrieved from some remote computer; only after that it the accused code downloaded onto the client computer. The discussion at pages 24-25 above explains that charts.js would have to be on the client computer (along with its graphical representation) before it could be selected. But it is not on the client computer when "Charts" is selected. Therefore, it cannot be the claimed interactive link.

Because the end user does not "select" the accused JavaScript code charts.js or any graphical representation of that code, charts.js cannot be an interactive link; and because Interactive Charting does not contain an "interactive link, it cannot infringe the '745 Patent. The motion for a summary judgment of non-infringement is thus GRANTED as to Interactive Charting and all products not colorably different from Interactive Charting.

2. None of the other accused codes are "selected" by the end user

The exact same argument applies to all four accused codes; none of them is "selected" by the end user. I will briefly explain why.

(i) "screenerutility.js.package.js"

E*TRADE's Screener product permits a user to winnow down a field of exchange traded funds ("ETFs") using criteria such as yield, rating, or commission cap. (Defendants' 56.1 at ¶ 12). Screener consists of JavaScript code located on both client devices and on E*TRADE's servers, including the alleged interactive link "screenerutility.js.package.js." (Droplets' 56.1 at ¶ 84). According to Droplets, that bit of code is stored on the client computer prior to being executed and

is "is not a bookmark, cookie, shortcut, hyperlink, or Internet address (URL)." (Droplets' 56.1 at ¶¶ 89, 91).

The route to the accused code screenerutility.js.package.js looks a lot like the road to "chart.js" in Interactive Charting, and the two products work similarly. The user logs on to E*TRADE's website, is presented with a web page that has a different URL, hovers over or clicks on the Research tab, clicks on the "ETF" button, and finally clicks on the "ETF Screener" tab. (Defendants' 56.1 at ¶ 14.). In other words, the user "selects" the ETF Screener tab. The user's "selection" of that tab starts an automated process that, in fractions of a second, returns a web page showing the user's most recent choice of filtered results. One step of that process is the retrieval of accused code screenerutility.js.package.js from a remote location, after which it is downloaded onto the client computer, where it executes.

The first step along that automated path is navigating to a web page at a different URL. (Droplets' 56.1 at ¶ 91). According to Defendants, the user's device requests and retrieves the accused code "when" the user clicks on the ETF Screener tab, and the user's internet browser requests and retrieves the same code "after" the user clicks on the same tab. (*Compare* Defendants' 56.1 at ¶ 17 *with id.* at ¶ 44). According to Droplets, "when a user navigates to the screener" (by clicking the ETF Screener tab) "HTML code is delivered to the user's computer." (Droplets 56.1 at ¶ 85). The user's device responds to the HTML code by requesting and retrieving the accused code screenerutility.js.package.js over an HTTP connection. (Droplets 56.1' at ¶ 85). After the accused code is retrieved, "and as a part of a request for results based on a selected screen, the screener [product] sends a user agent header to E*TRADE's servers." (Droplets' 56.1 at ¶ 87).

If the user then logs out, closes the browser, reopens the browser, logs back on, and navigates back to the screener page, the user's most recent choice of filtered results is displayed.

(Defendants' 56.1 at ¶ 16). According to Droplets, the accused code contributes to restoring that display in that it is responsible for "populating the user interface with funds that are associated with" the relevant previous display. (Droplets' 56.1 at ¶ 92). It does not, however, store internally all of the data required to do so. (Defendants' 56.1 at ¶ 19).

It is undisputed that the user "clicks on" the ETF Screener tab, not on the accused code or on any representation of the accused code. I agree with Defendants that the user "selects" ETF Screener tab, not the process that his mouse click unleashes. I further agree that it would be impossible for the user to "select" the accused code because, when he positions his pointer and clicks on his mouse, the code that Droplets says he is "selecting" is not to be found on his computer.

Defendants' motion for a summary judgment of non-infringement is GRANTED with respect to Screener and all products not colorably different from Screener.

ii. "tda.js"

TD Ameritrade's Dock product allows a user to customize the homepage that will appear when she logs on to TD Ameritrade's website, by choosing and arranging informational modules such as news, indices, and shortcuts. (Defendants' 56.1 at ¶¶ 22, 25; Droplets' 56.1 at ¶ 104).

To reach Dock, a user logs on to the TD Ameritrade website using a username and password (Defendants' 56.1 at ¶ 23). The log-on triggers an automated sequence that causes the accused code tda.js to be retrieved and executed. (Droplets' 56.1 at ¶¶ 106-108.) The first step in that automated sequence is the delivery of HTML code to the user's device, which then requests and retrieves the accused code. (*Id.*) If the user logs out, closes the browser, opens the browser, and logs back on, the Dock is displayed with the modules in the same general arrangement as the user left them. (Defendants' 56.1 at ¶ 26).

The accused code does not house all of the data necessary to perform that restoration. (Defendants' 56.1 at ¶ 29). However, according to Droplets, the process triggered by logging on causes the accused code to "restore[] aspects of the operating state that the user left behind – such as ordering and content of the dock modules." (Droplets' 56.1 at ¶ 113).

The parties' positions with respect to "selection" are identical with regard to Dock as they are with regard to Interactive Charting and Screener, and I reach the same result: the user does not "select" tda.js, and he does not "select" that code as part of a process unleashed when he does "select" the log on button to TD Ameritrade's website (either by clicking it or typing a username and password and then pressing "Enter"). For the reasons recited above, the word "select" as used in the '745 Patent precludes a finding of infringement where the user never has the option to click on a direct representation of the alleged interactive link.

Defendants' motion for a summary judgment of non-infringement is GRANTED with respect to Screener and all products not colorably different from it.

iii. "jquery.autocomplete.ext.js"

When a user types a few letters into the E*TRADE website's "search" box, E*TRADE's "Search Suggest" product offers a drop-down menu of suggested search terms, which process is enabled by the accused code "jquery.autocomplete.ext.js." (Defendants' 56.1 at ¶ 32.) While the search suggestions that are returned to the user are in some way tailored to who logs on to the site, no record evidence shows that a user may actively customize Search Suggest. (Defendants' 56.1 at ¶¶ 39, 53, 56.)

According to Droplets' expert, each of the suggestions provided in the drop-down menu "represents previous operating states of the search [product]. When the user selects one of these suggestions, the [accused code] restores a previous operating state of the search product by relaunching the corresponding search." (Droplets 56.1 at ¶ 103.) Droplets admits, however, that

the suggested searches are not necessarily the *user*'s prior searches – a user may well see suggested searches that he himself never performed.

Defendants urge that the user never "selects" the accused code or any graphical representation of it, and they are right – for the same reasons I have already stated. Therefore, Defendants are entitled to summary judgment with respect to the Screener product, and products not colorably different from it.

3. E*TRADE is also entitled to summary judgment as to Search Suggest because it does not restore a particular user's operating state.

Defendants offered an alternative ground for summary judgment as to all the accused products: they did not have all the facilities necessary for restoring an end user's previous operating states. This issue is more complicated than the issue of "selection" of the link, and might not result in summary judgment for Defendants as to three of the four accused products.[11] However, as to Search Suggest, this issue is dispositive: Search Suggest fails to restore the previous operating state, because it does not restore *a particular user's* previous operating state.

The claimed interactive link includes facilities for *re-establishing* previous operating states of the application *as the application is re-presented at a user's computer*. (Docket #218 at 11-12; Docket #242 at 1, 6.) During claim construction, I construed "re-establish" to mean "restore" and explained that "what is restored (re-established) depends on the words that surround the word 're-establishing.'" (Docket #218 at 16.) The best example of what it means to "restore a previous operating state" is the one discussed in detail above: when the user selects the icon for "Charts," he doesn't just get the outlines of a chart; he gets the exact chart he was looking at when he logged out of Interactive Charting the last time he used it.

[11] This statement should not be taken as any indication that the Court has fully considered that question; because it is not necessary, I have not done so.

That is not how Search Suggests works. When a user types a few letters into the E*TRADE website's "search" box, the "Search Suggest" product offers a drop-down menu of suggested search terms, which process is enabled by the accused code "jquery.autocomplete.ext.js." (Defendants' 56.1 at ¶ 32.) While the search suggestions that are returned to the user are in some way tailored to the user who logs on to the site, no record evidence shows that the user may actively customize Search Suggest. (Defendants' 56.1 at ¶¶ 39, 53, 56.)

There is also no evidence that the suggested searches were previously performed by the user to whom they are being suggested, or that that user will have seen them before. According to Droplets' expert, each of the suggestions provided in the drop-down menu "represents previous operating states of the search [product]. When the user selects one of these suggestions, the [accused code] restores a previous operating state of the search product by relaunching the corresponding search." (Droplets' 56.1 at ¶ 103.) Droplets admits, however, that the suggested searches are not necessarily prior searches conducted by the user who is looking at the drop-down menu; a user may well see suggested searches that he himself never performed.

Assuming arguendo that a prior search – which I assume to mean prior search results – can constitute a "previous operating state" (a proposition Defendants would dispute), Defendants argue that the '745 Patent only protects methods of restoring to a particular user *his own* previous operating state – not some other user's previous operating state. They argue that the patent does not extend to methods for giving one user the benefit of other users' previous search requests.

"Previous operating state" is a term that appears in the claims, but the parties did not suggest that it was a disputed claim term during the *Markman* phase. Droplets now objects that Defendants are seeking to have the court construe the term "previous operating state," apparently

because Droplets now defines that term differently than Defendants do. It argues that Defendants should have raised this issue during claim construction.

Defendants quite rightly respond that any novelty in its argument arises because, at the *Markman* phase, Droplets did not indicate that Search Suggest infringed the '745 Patent. It only designated Search Suggest as an infringing product after the *Markman* decision was handed down – which was also after the Patent Office decimated a prior theory by invalidating a related patent, the '838 Patent.

Only intrinsic evidence is needed to settle this new dispute regarding what "previous operating system" means. The '745 Patent always and only describes the claimed method as restoring to a particular user his own previous operating state. An interactive link must, by definition, be able to restore a previous operating state by "*re*-presenting" it at the user's computer. (Claim Construction, Docket #218 at 9-11) (emphasis added). That requirement reflects the objects of the invention, which include the ability to, "when selectively employed to retrieve and present . . . remotely stored . . . information on a client computer . . . [restore] . . . a previous operating state of the application." ('745 Patent at 4.) You cannot "*re*-present" something to End User A if that something never appeared on his screen in the first place – but appeared on End User B's computer. As a matter of plain English, something cannot be "re-presented" on a user's computer unless it was "presented" there at some earlier time.

Droplets counters that Defendants' argument is impermissibly derived from preferred embodiments. It is not. Under the heading "Persistent State Maintenance," the specification teaches that "*in accordance with the present invention*,"

> the application server maintains state information regarding current operating states of each droplet-enabled application in the data store. . . The state information includes a user identification field such that operating state information for a particular user is retrievable from

> the data store. It should be appreciated that the present invention contemplates a sign-on procedure or similar mechanism wherein a user registers prior to beginning a session. Accordingly, state information corresponding to a[n] operating session of the user may be identified by a user id or the like. . . *When the same user re-invokes a droplet-enabled application, the state information corresponding to each application the user executed during their last session is reviewed . . . and retrieved.*

(Docket #260-10 at 24:61-25:13) (emphasis added). That these sentences are preceded by the phrase "in accordance with the present invention" is highly significant; only last year, the Federal Circuit held that this phrase constitutes "a strong indication that a statement is not limited to a single, preferred embodiment," *Tristrata, Inc. v. Microsoft Corp.*, 2014-1168, 2014 WL 6805001, at *3 (Fed. Cir. Dec. 4, 2014).

Once again, the text of the patent itself is fatal to Droplets' argument. The quoted passage makes plain that the patented method must restore the user's own prior "state information." Search Suggest does not do that. Therefore, Search Suggest and products not colorably different from Search Select do not infringe the '745 Patent – not only because the accused code that allegedly renders Search Select infringing is not "selected" by the user, but also because the product lacks facilities for restoring the user's previous operating state.

CONCLUSION

For the foregoing reasons, Defendants' motion for a summary judgment of non-infringement of the '745 Patent is GRANTED in its entirety. The Clerk of Court is directed to remove Docket No. 259 from the list of the Court's pending motions. The parties should provide the court with an appropriate order to sign in order to close the case.

Dated: March 9, 2014

U.S.D.J.

BY ECF TO ALL COUNSEL