

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

PACKET INTELLIGENCE LLC,

Plaintiff,

v.

**NETSCOUT SYSTEMS, INC.,
TEKTRONIX COMMUNICATIONS, and
TEKTRONIX TEXAS, LLC,**

Defendants.

Case No. 2:16-cv-00230-JRG

Jury Trial Demanded

(Lead Case)

**NETSCOUT'S RULE 50(b) RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW OF NO INFRINGEMENT**

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I. INTRODUCTION

Defendants NetScout Systems, Inc. and NetScout Systems Texas, LLC (formerly known as Tektronix Texas, LLC d/b/a Tektronix Communications) (collectively, “NetScout”) respectfully move this Court to grant Judgment as a Matter of Law (“JMOL”) of No Infringement, pursuant to Federal Rule of Civil Procedure 50(b), because Plaintiff Packet Intelligence LLC (“PI”) failed to present legally sufficient evidence for the jury to find any infringement (direct or indirect) of claims 10 and 17 of the ’725 patent, claims 1 and 5 of the ’751 patent, and claims 19 and 20 of the ’789 patent (collectively, “the Asserted Patents” or “the Asserted Claims”).

NetScout respectfully submits this is a case where the Court should vacate the jury’s verdict of infringement. As explained herein, there is no dispute that PI failed to present evidence that the accused G10 and GeoBlade products (the “Accused Products”) have any functionality that associates connection flows into “conversational flows,” as required by each Asserted Claim. The only functionality alleged to associate flows into “conversational flows” was provided by an optional feature, the Web Page Download Time KPI (“WPDT”). PI’s expert, Dr. Kevin Almeroth, conceded this feature was never used or sold. *See* Dkt. No. 250, 10/12/17 PM Trial Tr. at 58:24-59:3.

To attempt to sidestep nonuse of the WPDT feature, Dr. Almeroth espoused an entirely new (and erroneous) interpretation of the Asserted Claims to suit the evidence. Dr. Almeroth told the jury that the Asserted Claims do not actually require associating or correlating flows of packets into “conversational flows.” *See* Dkt. No. 245, 10/10/17 PM Trial Tr. at 197:20-198:8 (Dr. Almeroth: “I don’t think that the actual correlation is a requirement of any of the asserted claims.”). He told the jury that the Accused Products still infringe because they store information that “can be used” to associate connection flows into “conversational flows.” Dkt.

No. 245, Trial Tr. 10/10/17 PM at 136:25-137:2; *id.* at 198:1-8 (Dr. Almeroth opining if an Accused Product “only contains connection flows, and it never correlates them” then it still infringes). Dr. Almeroth thus vastly broadened the scope of the Asserted Claims to read them onto the Accused Products by eliminating a fundamental requirement, *i.e.*, associating flows into “conversational flows.”

Dr. Almeroth’s new interpretation, heard for the first time at trial, is not correct. In fact, it is contrary to this Court’s construction of “conversation flows” and the Asserted Patents’ teaching that classifying connection flows into “conversational flows” is “[w]hat distinguishes this invention from prior art network monitors,” which could merely “classify packets into connection flows.” ’789 patent at 2:42-44, 3:56-59; *see also id.* at 3:10-12 (“[I]t is desirable for a network packet monitor to be able to ‘virtually concatenate’—that is, to link—the first exchange with the second . . . [so that] the two packet exchanges would then be correctly identified as being part of the same conversational flow.”). His interpretation is also contrary to what he and PI previously agreed was required by the Asserted Claims. For example, Dr. Almeroth repeatedly admitted at his deposition that the Asserted Claims as construed by the Court required “associating” or “correlating” flows into “conversational flows.” *See, e.g.*, Declaration of Michael J Lyons, Ex. A (Almeroth Dep. Tr.) at 105:7-11 (Dr. Almeroth: “[I]t’s doing the kinds of classification of flows and then associating them in the way that it’s consistent with the Court’s construction”), 134:20-135:4 (“[Y]ou can get from individual flows into a correlation of flows that meets the Court’s claim construction”). And, in opposing NetScout’s motion for summary judgment of noninfringement, PI told the Court the Accused Product actually “correlate two or more connection flows” and thereby infringe the Asserted Claims. Dkt. No. 157 at 9, 13.

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