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 18 GOOGLE INC.

19 **UNITED STATES DISTRICT COURT**  
 20 **NORTHERN DISTRICT OF CALIFORNIA**  
 21 **SAN FRANCISCO DIVISION**

22 INTERMEC TECHNOLOGIES CORP.,  
 23 a Delaware Corporation,

24 Plaintiff,

25 v.

26 PALM, INC., a Delaware Corporation,

27 Defendant.

CASE NO. 09-80097 MISC WHA

Related to:

CASE NO. 09-80098 MISC WHA

**DECLARATION OF SCOTT T.  
 WEINGAERTNER IN SUPPORT OF  
 GOOGLE INC.'S OPPOSITION TO  
 INTERMEC'S RESPONSE TO ORDER  
 TO SHOW CAUSE RE SANCTIONS**

1 I, Scott T. Weingaertner, hereby declare as follows:

2 1. I am a Partner in the law firm of King & Spalding LLP, based in the firm's New  
3 York office.

4 2. I am a resident of the State of New Jersey over 18 years of age, have knowledge of  
5 the facts stated herein, and would testify to the same before this Court if called upon to do so.

6 3. I am counsel for Google Inc. ("Google") in this matter.

7 4. I submit this Declaration in support of Google's Opposition to Intermecc's Response  
8 to Order to Show Cause re Sanctions and, in particular, to correct or otherwise address certain  
9 assertions contained in the Declaration of Jeffrey Hansen appended to the Response of Intermecc  
10 Technologies Corp. (hereinafter "Intermecc").

11 5. I am admitted to practice law in New York, and have been actively practicing  
12 patent litigation since my admission to the Bar of the State of New York in January of 1993.

13 6. At the request of Google, I have represented the company in this matter since  
14 approximately the latter half of April, 2009.

15 7. I have significant first-hand experience in handling discovery for Google in a  
16 number of active patent infringement matters respectively concerning individual features of  
17 Google applications. As a result of my significant first-hand experience, I was able to, and did,  
18 provide informed conclusions to Intermecc as to the burdens associated with documentary  
19 discovery and testimony concerning the functionality of Google applications, as demanded by its  
20 subpoena of Google ("the Subpoena").

21 8. Prior to my initial communications with counsel for Intermecc in this matter, and  
22 contrary to Mr. Hansen's suggestion (Declaration of Jeffrey Hansen in Support of Intermecc  
23 Response to Order to Show Cause re Sanctions ("Hansen Decl.") ¶ 16), I was fully informed of  
24 communications and negotiations between Google's responsible in-house counsel and counsel for  
25 Intermecc.

26 9. My understanding is that Intermecc, in its discussions with in-house counsel for  
27 Google, never actually modified or offered to modify the ultimate scope of its Subpoena. This  
28

1 understanding is corroborated by subsequent communications with counsel for Intermec, both  
2 written and oral.

3 10. Though requested by Google in-house counsel, Intermec never provided any  
4 justification for its Subpoena or its scope.

5 11. Intermec's refusal to provide Google in-house counsel with narrowed subpoena  
6 topics for testimony or requests for documents, or to provide a justification for the company-wide  
7 nonparty discovery it demanded from Google, was corroborated by my experience in  
8 communicating with Intermec.

9 12. I first spoke with counsel for Intermec in the afternoon of Wednesday, April 29,  
10 2009. During that call, I requested that Mr. Hansen describe how Intermec contends that Google's  
11 confidential information as identified in Intermec's Subpoena would be relevant to its pending  
12 case against Palm. To the same end, I requested an identification of Intermec's asserted claims.

13 13. Also during this initial call of April 29, 2009, with Intermec counsel, I requested  
14 that, to the extent Intermec was seeking information from Google in connection with its  
15 allegations of infringement, Intermec should provide available claim construction positions and  
16 infringement contentions (and Google expressed willingness to accept them in redacted form to  
17 protect the proprietary interest of Palm) in order to lay out its theory of relevance with definiteness  
18 and clarity.

19 14. In addition, during the same initial call, I described from first-hand experience how  
20 Intermec's Subpoena would impose an enormous and apparently company-wide burden on  
21 Google. That description was reflected in my subsequent letter of May 5, 2009 at page 1.  
22 Attached hereto as Exhibit A is a true and correct copy of my May 5, 2009 letter. This letter  
23 contradicts Mr. Hansen's assertion at paragraph 19 of his Declaration. In addition, during the  
24 April 29, 2009 call, I described how it appeared unlikely that any highly simplified documents (of  
25 the sort Mr. Hansen has identified as "Google For Dummies"-type documents in paragraph 14 of  
26 his Declaration) would be in Google's possession, since Google's documentation tends to be  
27 prepared for the consumption of Google engineers, unlike those apparently obtained from

1 Microsoft, per paragraph 4 of the Hansen Declaration (which according to Mr. Hansen during the  
2 call of April 29, 2009, may have been intended not for internal use only, but for Microsoft third-  
3 party developers or customers).

4 15. Rather than narrow the scope of its Subpoena, Intermecc effectively sought to  
5 broaden it. Whereas Intermecc's Subpoena contained the following Topic and Request: "The  
6 manner in which Google Applications, such as Google Maps, Google Calendar, Google Docs,  
7 Gmail, and Picasa, store and access data," Intermecc's letter of April 30, 2009 includes the  
8 following: "General information regarding the architecture used in Google products/applications  
9 (for example, identifying the tiers and the functions each tier performs)." Attached as Exhibit B is  
10 a true and correct copy of Intermecc's March 24, 2009 subpoena to Google, as Exhibit C is a true  
11 and correct copy of Intermecc's March 2, 2009 subpoena to Google, and as Exhibit D is a true and  
12 correct copy of Intermecc's April 30, 2009 letter from Jeffrey Hansen to me.

13 16. To date, Intermecc has not set forth a justification for asserting that any of the  
14 targeted Google confidential information is relevant to its case against Palm. (*See* Exhs. D, F, and  
15 K introduced respectively at ¶ 15, *supra*, and ¶¶ 21 and 31, *infra*. *See also* Paragraph 26 below,  
16 addressing Intermecc's Expert's failed attempt to shed light on Intermecc's theory).

17 17. Intermecc's portion of the negotiation has involved purporting to offer to *accept*  
18 initial production of a subset of virtually the entirety of Google's products, but otherwise not agree  
19 to actually narrow or otherwise modify the topics and requests of the subpoena of Google.

20 18. As I described to this Court during the May 15, 2009 hearing, on more than one  
21 occasion Mr. Hansen and/or his colleagues stated that Intermecc would *begin* with certain  
22 applications to see which ones "fit" their theory and that they would stop asking Google for  
23 production once it obtained documents and testimony that "fit." *See* Transcript of the Hearing of  
24 May 15, 2009 at 6: 16-20, attached hereto as Exhibit E. Intermecc has never explained to Google  
25 or this Court what it would actually mean for Google information to "fit." My explanation to the  
26 Court of Intermecc's intention to proceed application by application until it found a "fit," was not  
27 rebutted by Intermecc counsel at oral argument. *See* Exh. E, Tr. at 16.

1           19.     During the call with Mr. Hansen of April 29, 2009, I discussed on the basis of  
2 firsthand knowledge (attested to above), combined with ongoing internal investigation, that the  
3 effort to respond to the Subpoena would be significant even for a single Google application.  
4 Specifically, based on collection and production of technical documentation in connection with  
5 actual litigation to which Google is a party, involving *a single feature of a single application*, the  
6 burden was quite significant. The effort across all Google applications (since all were targeted in  
7 the actual subpoena) would roughly multiply the burden by the number of such applications, far  
8 more burdensome than the onus on a typical patent infringement defendant.

9           20.     Mr. Hansen avers that he “emphasized that Intermecc was seeking to minimize the  
10 impact on Google.” Hansen Decl., ¶ 8. What Mr. Hansen is apparently referring to is Intermecc’s  
11 position that it wished to proceed -- application by application -- through all of Google’s  
12 applications until finding one with documents and testimony that “fit” its theory, a theory that has  
13 not been supplied to Google or the Court. But again Intermecc did not reduce or otherwise modify  
14 the actual scope of its company-wide Subpoena, never did so in writing, and explicitly reserved its  
15 rights under the Subpoena *See* Exhs. D and F, introduced respectively at ¶ 15, *supra* and ¶ 21,  
16 *infra*.

17           21. I disagree with Paragraph 15 of Mr. Hansen’s Declaration. Whether or not it is the  
18 case that Intermecc offered to begin its inquiry by focusing on discovery of two Google  
19 applications, Intermecc was very clear that these applications would form only its “initial focus”  
20 and that it would in no way narrow the full scope of its Subpoena. Exh. D. *See also* Mr. Hansen’s  
21 May 8, 2009 e-mail to me, a true and correct copy of which is attached hereto as Exhibit F. The  
22 April 30<sup>th</sup> letter sent by Mr. Hansen would have enlarged the burden on Google, demanding that  
23 Google provide a “a list of protocols or scripting languages” for mobile versions of Google  
24 applications and “[g]eneral information regarding the architecture used in Google  
25 applications/products (for example, identifying the tiers and the functions each tier performs).”  
26 Exh. D.

1           22.     I disagree with the assertions in paragraph 16 of Mr. Hansen's Declaration. First,  
2 Mr. Hansen's assertion that the undersigned was not "informed by [my] client of [the] previous  
3 discussions [with Intermecc] regarding the relevance of Intermecc's subpoena" is untrue. Intermecc  
4 did not provide Google in-house counsel with any intelligible theory of relevance of the nonparty  
5 discovery it was seeking, as borne out by the written record before the Court.

6           23.     I also disagree with the assertions in paragraph 16 of Mr. Hansen's Declaration, in  
7 particular Mr. Hansen's assertion of "repeated offers to [the undersigned] of having one or more of  
8 the patent/technical specialists on our legal team walk [the undersigned] through the information  
9 Intermecc was seeking, and answer any of his questions at a higher level of detail." This statement  
10 is not well-taken: I requested that Intermecc provide its relevance theory in writing, but never  
11 received it. Mr. Hansen was himself either unable or unwilling to articulate Intermecc's theory of  
12 relevance or willing to present its theory to Google or this Court in written form.

13           24.     I disagree with the assertion in paragraph 17 of Mr. Hansen's Declaration. Mr.  
14 Hansen refers to Google's "ever-increasing list of demands". Again, this assertion is not  
15 supported by the facts. Google never asked for information other than Intermecc's theory of  
16 relevance, which Intermecc never provided. In order to help discern that theory in the absence of  
17 any intelligible or written explanation, Google had maintained its requests for (i) an identification  
18 of asserted claims, (ii) Intermecc's claim construction, and (iii) Intermecc's infringement contentions  
19 (suitably redacted to protect Palm). Attached hereto as Exhibit G is a true and correct copy of my  
20 e-mail to Mr. Hansen dated May 7, 2009. *See also* Exh. A. These requests were directed to  
21 documents that Intermecc must, at this late stage of its patent infringement case against Palm, have  
22 ready at hand. As Intermecc's case has now been pending for two years and the close of its  
23 repeatedly extended fact discovery period is imminent, Intermecc is likely already in possession of  
24 these documents and/or information; its unwillingness to share this information under the  
25 Protective Order in this case, while at the same time seeking nonparty discovery of confidential  
26 information regarding nearly all of Google's applications, is ironic.

1           25.     I also disagree with Mr. Hansen’s mischaracterization regarding Google’s inquiry  
2 of Intermec regarding its intentions to sue. At oral argument before this Court, counsel for  
3 Intermec incorrectly asserted that Google sought to condition its nonparty production on receiving  
4 a covenant from Intermec not to sue. Weingaertner Decl., Exh. E, Tr. at 19: 4-9. I brought this  
5 incorrect assertion to the Court’s attention at oral argument (Exh. E, Tr. at 20: 5-10) and  
6 Intermec’s counsel by his silence tacitly acknowledged that he had not correctly characterized  
7 these facts to the Court. Indeed, it was not possible for Intermec’s counsel to contradict Google on  
8 this point, because Google had appended to its Motion to Quash a proposed order in which Google  
9 would have produced nonparty evidence in the absence of any covenant by Intermec not to sue.  
10 Finally, Mr. Hansen has omitted any mention of Google’s repeated attempts to negotiate a  
11 compromise, none of which were conditioned on a covenant not to sue.

12           26.     Neither Mr. Hansen nor Dr. Nettleton, the expert Intermec engaged to present a  
13 theory of relevance to support Intermec’s Subpoena of Google, has come forward with any  
14 evidence that Intermec undertook any effort to investigate, as a technical matter, how Google  
15 applications “operate” on Palm devices. Mr. Hansen’s Declaration, while asserting that the  
16 undersigned’s explanation of the discovery burden of Intermec’s subpoena of Google was  
17 inadequate, is silent on this matter, as is Dr. Nettleton’s Declaration.

18           27.     I also disagree with the statements in paragraph 19 of Mr. Hansen’s declaration.  
19 During every call with Mr. Hansen, I explained from first hand experience the extreme burden  
20 imposed by the topics and requests of Intermec’s Subpoena. I explained at a high level how the  
21 teams working on various Google applications generally tend to be organized, how the teams  
22 differ from application to application, how the client and server sides generally require distinct  
23 inquiries, how personnel are not all located in one office or even one country, and how the  
24 discovery of the sort Intermec was seeking, when targeted at a single feature of a single  
25 application was a significant fraction of a full blown patent litigation – so that seeking all features  
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1 of all applications and all versions without any temporal limitation would be extraordinarily  
2 burdensome.

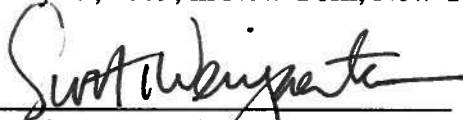
3 28. On May 15, 2009, the day this Court issued its Order Quashing Intermec's  
4 Subpoena, Intermec contacted the Delaware Court to arrange a call with Magistrate Judge Stark.  
5 Intermec did not pay Google the courtesy of any notice of this call. The call with Judge Stark was  
6 held on May 18, 2009, and a transcript of that hearing is attached hereto as Exhibit H. Counsel for  
7 Intermec, during that hearing, indicated that Intermec intended to "reissue a subpoena out of  
8 Delaware related to Google with a relatively quick return date..." Exh. H, Tr. at 6: 16-18.

9 29. Attached as Exhibit I is a true and correct copy of the November 10, 2008  
10 Scheduling Order in the underlying Delaware case.

11 30. Attached as Exhibit J is a true and correct copy of the August 16, 2007 Scheduling  
12 Order in the underlying Delaware case.

13 31. Attached as Exhibit K is a true and correct copy of the May 7, 2009 e-mail from  
14 Mr. Hansen to myself.

15 I declare under penalty of perjury under the laws of California and the United States that  
16 the foregoing is true and correct. Executed on May 29, 2009, in New York, New York.

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19 Scott T. Weingaertner  
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