

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE JEFFREY S. WHITE

IN RE GOOGLE INC., ANDROID	)	
CONSUMER PRIVACY LITIGATION.	)	No. M 11-2264 JSW
_____	)	
TROY YUNCKER, individually and on	)	
behalf of all others similarly	)	
situated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. C 11-3113 JSW
	)	
PANDORA MEDIA, INC.,	)	
	)	San Francisco, California
Defendant.	)	Friday
_____	)	September 23, 2011

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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(Appearances continued on next page)

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**BY: TYLER NEWBY, ESQUIRE**

P R O C E E D I N G S

1  
2 **SEPTEMBER 23, 2011**

1:27 P.M.

3  
4 **THE COURT:** Good afternoon, everybody. Please be  
5 seated.

6 **THE CLERK:** Calling case number MDL 11-2264, In Re:  
7 Google Android Consumer Privacy Litigation, and case number  
8 C-11-3313, Yuncker versus Pandora Media.

9 Counsel, please step forward to the podiums and state  
10 your appearances.

11 To the podiums, Counsel. Thank you.

12 **MR. KAMBER:** Good afternoon, Your Honor. Scott  
13 Kamber on behalf of plaintiffs in King versus Google.

14 And I'm also appearing on behalf of the plaintiffs of  
15 counsel in the Urias case. They're in Texas. We have  
16 similarly-situated interests, and they have authorized me to  
17 appear on their behalf.

18 **THE COURT:** Welcome, sir.

19 **MR. KAMBER:** Thank you.

20 **MR. AUDET:** Good afternoon, Your Honor. William  
21 Audet from Audet & Partners for plaintiff Levine.

22 **THE COURT:** Welcome.

23 **MR. TSADIK:** Good afternoon, Your Honor. Tesfaye  
24 Tsadik appearing on behalf of Hendrick Cochran.

25 **THE COURT:** Welcome.

1           **MR. TSADIK:** Thank you.

2           **MS. MANIFOLD:** Good afternoon, Your Honor. Betsy  
3 Manifold, Wolf Haldenstein, on behalf of Troy Yuncker in the  
4 Yuncker versus Pandora case.

5           **THE COURT:** Good afternoon.

6           **MS. MANIFOLD:** Good afternoon, Your Honor.

7           **MR. MANN:** Good afternoon, Your Honor. Jonas Mann,  
8 Audet & Partners, on behalf of the Levine plaintiffs.

9           **THE COURT:** Good afternoon.

10          **MR. RUBIN:** Good afternoon, Your Honor. Michael  
11 Rubin of Wilson Sonsini for Google and all of the now  
12 consolidated MDL matters against them.

13          **THE COURT:** Good afternoon.

14          **MR. RUBIN:** And my colleagues, David Kramer and Evan  
15 Stern.

16          **THE COURT:** Welcome.

17          **MR. NEWBY:** Good afternoon, Your Honor. Tyler Newby  
18 of Fenwick & West on behalf of Pandora in the Yuncker versus  
19 Pandora matter.

20          **THE COURT:** Good afternoon.

21                 All right. What I would like to do is go through  
22 some of these agenda items, and then if there's any questions,  
23 comments or arguments that anybody has to make, I'll go through  
24 those.

25                 The first question I have is, I assume everybody

1 received the Court's pretrial order and agenda for the initial  
2 case management conference.

3 Great. So if you'll follow along with me, on page 5  
4 of paragraph 12A, the discussion of interim class counsel. And  
5 I wondered whether you had reached a consensus concerning  
6 interim class counsel?

7 **MR. AUDET:** Your Honor, this is William Audet for the  
8 plaintiffs.

9 **THE COURT:** Yes.

10 **MR. AUDET:** I've discussed, I think, with everybody  
11 who has a filed case with respect to the Google case, not the  
12 Yuncker case.

13 **THE COURT:** Right.

14 **MR. AUDET:** They all have agreed that Mr. Kamber and  
15 I would serve as co-lead counsel, if that was acceptable with  
16 Your Honor. I wanted to confirm that with a follow-up call,  
17 one more follow-up, just in case I missed a lawyer.

18 So I would like to represent to the Court that I have  
19 spoken to everybody, but I'd like to speak one more time if  
20 it's okay with Your Honor.

21 **THE COURT:** It's perfectly okay. I would like to  
22 have a document, a stipulation and order to that effect. And  
23 in the unlikely event, from what you're saying, of there not  
24 being such a consensus, then I'd like to get a briefing  
25 schedule on a motion to appoint you or whoever is moving to be

1 interim class counsel.

2 **MR. AUDET:** Yes, Your Honor.

3 **THE COURT:** And then I would, as I mentioned in the  
4 order and as the JPML rules and manuals contemplate, you would  
5 then be the liaison, administratively speaking, throughout the  
6 case. Is that correct?

7 **MR. AUDET:** Yes, Your Honor.

8 **THE COURT:** Very well. All right. Well, that's  
9 good. So I'd like to set a deadline by which you would  
10 finalize that process.

11 **MR. AUDET:** Seven days, 14 days, whatever suits Your  
12 Honor.

13 **THE COURT:** Let's say two weeks. Murphy's Law might  
14 apply here.

15 **MR. AUDET:** Usually.

16 **THE COURT:** Ms. Ottolini, two weeks from today for  
17 filing a stipulation for a briefing schedule with respect to  
18 appointment of interim counsel, class counsel.

19 **MS. MANIFOLD:** Your Honor, Betsy Manifold.

20 **THE COURT:** Yes.

21 **MS. MANIFOLD:** May I be heard?

22 **THE COURT:** Yes, of course.

23 **MS. MANIFOLD:** On behalf of the Pandora case, the  
24 Yuncker versus Pandora case, my understanding is that interim  
25 counsel would not cover that case. There's no overlapping

1 parties. There's no similarity in class.

2 We're the only counsel in the Yuncker case. So I  
3 don't know that it would be necessary to appoint interim  
4 counsel separately for the Pandora case.

5 **THE COURT:** I think you're right. I don't anticipate  
6 that will be the case. Although, as you'll hear when we get  
7 into some of the nitty-gritty here, I intend to run the cases  
8 in parallel, for the moment.

9 I don't know -- unless you, Counsel, have a different  
10 view -- that that's inappropriate. I don't want to jam two  
11 cases together artificially. But I'd like to run them together  
12 just schedule-wise.

13 Is that acceptable to you?

14 **MR. AUDET:** Yes, Your Honor. William Audet speaking  
15 for plaintiffs.

16 **THE COURT:** Yes.

17 **MR. AUDET:** Yes, Your Honor.

18 **THE COURT:** Okay. Great.

19 **MS. MANIFOLD:** And that's acceptable, also. Betty  
20 Manifold on behalf of Yuncker plaintiffs.

21 We've conferred and we now agree that they should be  
22 on parallel tracks.

23 **THE COURT:** Great. Well, good. That's good. All  
24 right. So your stipulation and order does not need to cover  
25 the Pandora case. Okay. Great.

1           Now --

2           **THE CLERK:** Do you want a date set?

3           **THE COURT:** Yes. I'm sorry.

4           **THE CLERK:** October 7th will be the date that will be  
5 due.

6           **THE COURT:** All right. Now, the next item I'd like  
7 to discuss is the item on page 7, which was 12E, the protective  
8 order. And I'm directing that counsel should be prepared to  
9 discuss the stipulated protective order.

10           And, as you know, there's one that's recommended on  
11 the Court's website. It might need to be modified because of  
12 this kind of case.

13           What could the parties report with respect to that  
14 paragraph?

15           **MR. AUDET:** Your Honor, I had a meet-and-confer  
16 yesterday with Mr. Rubin, counsel for Google, and we discussed  
17 either using the model. And Google may, in fact, have one  
18 similar to the model, Your Honor. And we may just provide  
19 that. We will go over it and provide it to Your Honor within a  
20 week or two weeks.

21           **THE COURT:** All right. Let's make it the same day,  
22 Ms. Ottolini.

23           **THE CLERK:** October 7?

24           **THE COURT:** Yes.

25           Now, item F on page 7. Settlement and ADR. So, now,

1 obviously, we'll have interim class counsel appointed,  
2 probably, in two weeks, and then the filing of the consolidated  
3 master class action complaint.

4           So have the parties talked about possible settlement  
5 discussions or ADR?

6           **MR. AUDET:** Your Honor, again, I had another  
7 discussion yesterday. We went over all your agenda items,  
8 including that item. In going through, we mentioned we  
9 obviously need to wait for appointment of lead counsel.

10           And then they mentioned -- Mr. Rubin, speak for  
11 yourself -- that they don't want to do ADR. But there's a  
12 particular position --

13           **MR. RUBIN:** Michael Rubin for Google.

14           **THE COURT:** Yes.

15           **MR. RUBIN:** Our view, at this point, is that  
16 mediation is likely to be the most effective, but that waiting  
17 until after a definitive ruling on the anticipated motion to  
18 dismiss makes the most sense. And until we have a fixed  
19 complaint, if there is one, will be the logical time to do  
20 that.

21           **THE COURT:** All right. Well, I think that's fair.  
22 The parties should continue to keep that in mind. But what I  
23 anticipate doing, certainly no later than in the time of ruling  
24 on the motion to dismiss the master -- the anticipated motion  
25 to dismiss the master complaint would be to set -- discuss

1 further deadlines for mediation, either private mediation or  
2 under the auspices of the Court's ADR program. And you should  
3 be thinking about which you prefer.

4 I think you're right that a mediation initially would  
5 be better than a magistrate judge because a magistrate judge  
6 wouldn't have as much time as a mediator would. But I will  
7 just advise you that the Court is going to be keenly interested  
8 in keeping that track open, not go too far down the path here  
9 as far as, you know, expenditure of resources before getting to  
10 that point.

11 Now, item G, scheduling. Obviously, the class  
12 certification motion will occur, will be filed after  
13 adjudication of the motion to dismiss.

14 So what have the parties discussed about as far as  
15 class certification motions?

16 **MR. AUDET:** Your Honor, we did have a discussion. I  
17 think we put it in our prior CMC. I'm speaking now -- I think  
18 it was six months.

19 **MR. RUBIN:** I believe that the -- this is Michael  
20 Rubin for Google.

21 **THE COURT:** Yes.

22 **MR. RUBIN:** The agreement was that we file as early  
23 as practical, although there was no agreement on a specific  
24 time frame. And the specific briefing schedule will be  
25 negotiated and the stipulation provided to the Court.

1           **THE COURT:** All right. How soon?

2           **MR. RUBIN:** It's not something that we can determine  
3 as the defendants. It's up to the plaintiffs. But we hope it  
4 would be done as soon as practical.

5           Frankly, Your Honor, until there's a fixed complaint,  
6 we're not sure whether there's any purpose in detailing a  
7 specific date. But if they have one in mind, we're happy to  
8 listen.

9           **MR. AUDET:** Your Honor, my view is we can probably  
10 get -- as long as we get some discovery from the defendants  
11 that will help us for class certification purposes, we can file  
12 a class cert within six months of when the Court rules on the  
13 motion to dismiss.

14           **THE COURT:** Okay. Well, I think that's fair. Is  
15 that acceptable with you?

16           So six months from -- and the date will be set forth  
17 in the Court's order on the motion to dismiss.

18           **MR. RUBIN:** Yes, Your Honor. We have no objection to  
19 that. And my understanding is that will track the close of  
20 fact discovery.

21           **THE COURT:** Correct. Yes. That's correct.

22           Okay. Let's see. All right. I want to -- the other  
23 items I think were pretty clearly set forth in the Court's  
24 order. And, also, counsel did a good job in the case  
25 management conference statement.

1 I want to go over some -- before I ask for general  
2 comments or any other matters that you all want to bring up,  
3 generally speaking -- and we've now established through the  
4 Pandora plaintiffs that the parties are willing there to stick  
5 to the same schedule that has been proposed in the Google  
6 matter. Is that correct?

7 **MS. MANIFOLD:** Your Honor, Betsy Manifold on behalf  
8 of the Pandora matter. That's correct.

9 And I also wanted to indicate that I have been  
10 listening to the schedule set in the Google case, and we  
11 certainly agree with the six months with regard to the class  
12 cert motion.

13 And we had a similar discussion with regard to ADR  
14 with the Pandora defendants, and it went along almost the exact  
15 same track that was recited here between the Google plaintiffs  
16 and Google.

17 So to the extent there's any differences, I would  
18 raise them with the Court. So far the scheduling has been  
19 acceptable, and we're willing to track as far as the scheduling  
20 has proceeded, at this point.

21 **THE COURT:** Right. And appreciate that. And one of  
22 the earliest things that will happen is, I'm assuming, and this  
23 is confirmed by the stipulation that was entered into -- that  
24 particularly an anticipated motion to dismiss in the Pandora  
25 case would be briefed and heard on the same day, same track,

1 and the hearing would be on the same day.

2           **MS. MANIFOLD:** Your Honor, Betsy Manifold. Yes, we  
3 agree on behalf of Pandora plaintiffs.

4           **THE COURT:** Okay. Great. And I assume Google has no  
5 objection to that? I guess you didn't have a dog in that  
6 fight.

7           **MR. RUBIN:** This is Mike Rubin for Google. To the  
8 extent we have a dog in that fight, we have no objection.  
9 That's what our proposal was.

10           **THE COURT:** All right. Very well. Okay.

11           So, again, I won't need to go through some of these  
12 items that I had noted in preparing with respect to, for  
13 example, on page -- on page 6 of the case management statement  
14 in the Pandora case, where there's a recommendation -- Google  
15 recommends scheduling responsive pleadings on case in parallel.  
16 We've discussed that. That will be the case. It will run  
17 parallel to the Google pleading schedule.

18           Same is true on initial -- the stay of initial  
19 disclosures reflected on page 7, starting on line 2. Initial  
20 disclosures being stayed until after the Court rules on  
21 Pandora's anticipated responsive pleading. And it should be  
22 due 30 days following the date on which the pleadings in the  
23 action become fixed. And we'll follow, again, the Google  
24 schedule there specifically.

25           With respect to -- on page 7, line 14, the

1 defendants' position with respect to the stay of discovery  
2 until after resolution of responsive pleading to the complaint,  
3 the Court accepts that. That's -- we are going to stay  
4 discovery as proposed in that regard. All right.

5 Similarly, page 8, at line -- starting at line 7,  
6 where you're discussing both the protective order and Bates  
7 numbering systems used in one proceeding acceptable on  
8 materials cross-produced in another, the Court accepts that as  
9 well. I think that's a good way to proceed.

10 And whatever -- with respect to class actions item  
11 number 9, line 17 on page 8, whatever schedule is worked out in  
12 the Google case will be followed in connection with the Pandora  
13 case, as well.

14 All right. Well, those were all the matters that the  
15 Court had on its agenda, because you all did an excellent job  
16 of preparing this and I was able to help you out with the  
17 Court's order.

18 Are there any other matters? I think we have the  
19 scheduling pretty well fleshed out, at least the first piece of  
20 this case pretty well on a good track.

21 So anybody have any comments? Questions? Concerns?

22 **MR. AUDET:** For plaintiffs, we don't have any.

23 Does Your Honor want to set another CMC?

24 **THE COURT:** Yes. I'm going to do that. What would  
25 counsel propose -- not necessarily a specific date, but in

1 terms of -- what I'd like to do in a case like this, I always  
2 do it as tied to an event.

3           So I'd like to hear from counsel about what event you  
4 think would be appropriate, because what I would anticipate at  
5 the next CMC would be getting a supplemental statement telling  
6 me what you've done since we last met, and do we need to change  
7 the schedule, and kind of where do we go in the next phase of  
8 the case.

9           So, I'll start with plaintiffs and then I'll ask  
10 defense counsel.

11           **MR. AUDET:** Your Honor, normally I would say just tie  
12 it to the motion to dismiss, but I think, actually, what I  
13 would recommend is it might save a little resources if people  
14 filing something that says we haven't done anything but the  
15 motion to dismiss, is maybe a hearing that's tied to Your Honor  
16 actually -- hopefully not denying the motion to dismiss --

17           (Laughter)

18           **THE COURT:** Hope springs eternal, right?

19           (Laughter)

20           **MR. AUDET:** Ever the optimist.

21           So that was my thinking, because in the past, when  
22 we've been before Your Honor we tell you at our CMCs, all we've  
23 done is a motion to dismiss.

24           **THE COURT:** Right. And that's not very satisfying.

25           So I think what I'll do is, rather than set a date now, I'll

1 set a date in the first substantive order the Court issues.  
2 And then if anybody thinks -- wants to come back or you want to  
3 come back with a stipulation and order saying there's really  
4 nothing to report, we propose maybe waiting until, you know,  
5 whatever -- it depends on the outcome, obviously.

6 But, you know, one alternative is such a motion is  
7 denied completely. One is that it's granted with leave. And  
8 the third is it's granted without leave.

9 If it's granted without leave, then it's the Ninth  
10 Circuit's problem, at that point, or whatever Circuit you all  
11 go to. But let's not cross that bridge at this point. And I  
12 will set that in the next order.

13 All right. Anything further the parties wish to --

14 **MR. NEWBY:** Yes, Your Honor. This is Tyler Newby for  
15 Pandora. And I invite counsel for Yuncker to correct me if I  
16 speak incorrectly, but we've met and conferred with the  
17 plaintiffs in our case, and there may be an amendment to the  
18 complaint in their case.

19 We would just suggest that that amendment, if there  
20 is one, to the complaint be along the same schedule as  
21 Google's -- as the filing of the consolidated complaint in the  
22 Google matter.

23 **THE COURT:** Is that acceptable?

24 **MS. MANIFOLD:** Betsy Manifold on behalf of the  
25 Pandora. Yes. I'm glad you clarified. That's what I had

1 assumed, we would file an amended complaint to concur with the  
2 Google amended complaint, but yes, I agree.

3           **THE COURT:** All right. So I assume, to the extent  
4 that that complaint is not as a matter of right, that there  
5 would be a stipulation. I don't like Rule 15 motions because  
6 they're usually a waste of time. And I assume, given where the  
7 case is, that that would be -- that would be acceptable.

8           So would your amended complaint -- would you contend  
9 it's of right?

10           **MS. MANIFOLD:** The complaint has not been amended and  
11 there's been no responsive pleadings, so I would contend it is  
12 as of right.

13           **THE COURT:** All right. Great. Then we don't have to  
14 worry about that. And I would expect the amendment to come  
15 down no later than the time of the filing of the consolidated  
16 complaint in the Google case. That way that'll track very well  
17 for motions to dismiss in both cases, and then the Court can  
18 run those in parallel.

19           One thing I wanted to say for no -- no reason other  
20 than it's sort of like an elephant in the room, the Court is  
21 aware that there have been recent decisions in similar cases --  
22 in the Apple case and in the Facebook or Twitter, the one  
23 before Judge Seeborg. And so I'm assuming counsel are aware of  
24 those cases.

25           Again, I haven't, quite honestly, read them yet. I

1 just read an article that they existed. And I'll attempt to  
2 read them at some point. But I think counsel should be aware.  
3 I'm not even sure they apply, but seem to be similar cases  
4 alleging involved invasion of privacy and the like.

5 And I assume that counsel will be giving those both  
6 in terms of their pleadings and in terms of their motions. Not  
7 necessarily does the Court find it would be bound by those  
8 decisions. I don't know what they say, but they seem to be in  
9 the same ballpark. And I want counsel to familiarize  
10 themselves with those decisions.

11 So, anything else from the plaintiff's perspective?

12 **MR. AUDET:** Speaking for plaintiffs, William Audet,  
13 no, Your Honor.

14 **THE COURT:** All right. From the defendants?

15 **MR. RUBIN:** Nothing further, Your Honor.

16 The only note I'll make is we believe October 7,  
17 which is two weeks from today, is the date we can strive to hit  
18 for a proposed protective order. Given that discovery is not  
19 going to actually occur for many months, it may be additional  
20 time will be needed. If there will, I would propose we submit  
21 a stipulation.

22 **THE COURT:** Fair enough. And, certainly, this is  
23 good cause. You know, I'm pretty strict on dates, but in an  
24 MDL case like this, I don't want my strictness to be the tail  
25 that wags the dog here.

1           So if you can stipulate to a reasonable extension, I  
2 certainly would grant that, because my goal is to keep  
3 everybody's feet to the fire. Keep this case on your front  
4 burner because it's going to be on my front burner, as I do  
5 with all these cases. And also to make sure nothing upsets the  
6 goal of parallelism, so we don't waste resources here and can  
7 run these cases in parallel. But subject to that, absolutely.  
8 Perfectly okay.

9           **MR. RUBIN:** Your Honor, I understand. With the goal  
10 of parallelism, I'll say that coordinating a protective order  
11 that will cover both the Yuncker and Google MDL may be a bit  
12 more complicated than a standard protective order.

13           **THE COURT:** Fair point.

14           All right. Anything further?

15           **MR. RUBIN:** Nothing further from Google.

16           **THE COURT:** All right. Thank you. You all so far  
17 have done an excellent job and the Court appreciates your  
18 cooperation in working with the Court.

19           (Counsel simultaneously thank the Court.)

20           (At 1:48 p.m. the proceedings were adjourned.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Tuesday, November 1, 2011

s/b Katherine Powell Sullivan

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Katherine Powell Sullivan, CSR #5812, RPR, CRR  
U.S. Court Reporter