

1 APPEARANCES: (Continued)

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6 Counsel for Plaintiff

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8 POTTER ANDERSON & CORROON, LLP
9 BY: DAVID E. MOORE, ESQ.

10 and

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12 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
13 BY: DAVID A. PERLSON, ESQ.
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15 and

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17 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
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22 P R O C E E D I N G S

23 (REPORTER'S NOTE: The following telephone
24 conference was held in chambers, beginning at 3:15 p.m.)

25 THE COURT: Good afternoon, counsel. This is
Judge Stark. Who is there, please? Counsel, this is Judge
Stark. Who is there, please?

MR. MOORE: Good afternoon, your Honor. David
Moore from Potter Anderson on behalf of Google. With me on
the line is David Perlson and also Andrea Roberts from Quinn

1 Emanuel.

2 MS. JACOBS LOUDEN: Good afternoon, your Honor.
3 For the plaintiff, Personalized User Model, this is Karen
4 Jacobs Louden from Morris Nichols. I have on the line with
5 me, Mark Nelson, Mark Friedman and Christian Samay from SNR
6 Denton.

7 THE COURT: I have a court reporter here with
8 me. It is our case of Personalized User Model versus Google
9 Inc., Civil Action No 09-525-LPS.

10 Today's call is for us to take a look again, I
11 should say yet again, at the dispute over -- well, now it is
12 basically whether some additional communications need to be
13 produced by the plaintiff as a result of the waiver that has
14 been found by the Court of privilege. I'm somewhat familiar
15 with the dispute at this point and have reviewed the papers,
16 but I will give you each a chance to address the remaining
17 scope of the dispute.

18 Google is the moving party, so you can go first.

19 MR. PERLSON: Thank you, your Honor. Good
20 afternoon. I apologize we're back here yet again, but they
21 are, from our perspective, very important materials.

22 What we are seeking here, your Honor, there are
23 these eight withheld documents. We are seeking them to the
24 extent that they concern conception and changed testimony and
25 changed interrogatories relating to the date of conception,

1 which were subjects that were discussed at these January 19th
2 and February 7th meetings and thus we think that they are
3 within the scope of the Court's order.

4 PUM has never said that these withheld documents
5 do not concern conception with the changed testimony and
6 interrogatory response. Instead, what they're saying is these
7 documents do not relate to Category A and B that the Court did
8 allow. At least, that is the way PUM is interpreting those
9 categories. What it seems to be happening here is that PUM
10 is interpreting these categories in such a way that A, B,
11 and C are necessarily exclusive of each other such that if a
12 document is concerning the preparation of the interrogatory
13 responses, that cannot concern one of the subject matters that
14 the Court did allow.

15 We would submit, your Honor, that is not how
16 the Court ruled. Your Honor specifically addressed the
17 situation at the hearing and found that when there is
18 overlap, what is going to be protected is the work product,
19 i.e., the interrogatory responses themselves.

20 I do not think that applies to any of the --
21 at least based on their log, it does not appear to apply to
22 any of the things they are still withholding, all of which I
23 think are e-mails, and none of which the plaintiff before
24 has claimed worked product protection. They throw away the
25 related claim in their brief, but it certainly does not seem

1 like these are the interrogatory responses themselves that
2 they are withholding.

3 Just as a practical matter, as we pointed out,
4 it does seem quite clear that SRI and the ownership issue
5 regarding it was discussed in connection with the changed
6 interrogatory response. If it was discussed the day after
7 the meeting, the February 7th meeting, it would be just as
8 relevant as if it is discussed in a February 7th meeting;
9 but under PUM's interpretation, if there was an e-mail from
10 PUM's counsel or the inventors, and this was on February 8th,
11 and it says if we agree to pick a September 21st conception
12 date to include in its interrogatory response, this would
13 put the ownership issue to bed. They are saying that would
14 not need to be produced. We would submit, your Honor, that
15 is just the type of thing that your Honor's order did allow
16 for, and that these documents should be produced.

17 Another point is that they are saying that our
18 argument is that because the Court granted its motion with
19 respect to Category B, the subject matters discussed in the
20 meeting, that PUM cannot withhold any documents outside of
21 drafts and supplemental interrogatory responses, but that is
22 not our argument.

23 Our argument is that anything that falls within
24 the subjects that your Honor did allow needs to be produced
25 regardless of whether it falls into the category that your

1 Honor did not allow, with the sole exception of the work
2 product, the interrogatory responses themselves, as your
3 Honor ruled.

4 A couple other things. They seem to be somehow
5 saying that documents on February 8th should not be produced
6 because they do not relate to the meetings themselves, but
7 there is nothing in your Honor's order that provided a cutoff
8 of February 7th, which is when that last meeting occurred.
9 In fact, I inquired as to the dates. We had specifically
10 said that was not the cutoff. The cutoff was the interrogatory
11 response. So these communications regarding conception the
12 day after the February 7th meeting are just as relevant to
13 the discussions in the meeting itself.

14 Finally, your Honor, I would just note that to
15 the extent that your Honor is not inclined to rule on the
16 papers themselves, that seems appropriate for a submission
17 in camera so that your Honor can determine whether these you
18 documents fall within the scope of your ruling.

19 THE COURT: Thank you very much.

20 Let me hear from the plaintiff, please.

21 MR. NELSON: Your Honor, this is Mark Nelson,
22 speaking on behalf of plaintiff PUM.

23 We, too, unfortunately find ourselves back here
24 again and really did not want to. Our position is different
25 than what Google states it. I think they misunderstand our

1 position.

2 We complied fully we believe with the order by
3 producing the documents relating to the scheduling of the
4 meetings and documents relating to the subjects discussed at
5 those meetings, but your Honor's order specifically denies
6 them communications regarding PUM's preparation of its
7 fourth supplemental responses.

8 It seems like when we kind of cut to the chase,
9 that what Google is really looking for here is documents
10 that somehow overlap. I think the question is, well, how do
11 you define relating to conception or relating to the changed
12 response? Because these e-mails, contrary to what counsel
13 said, most are work product, and many of them do have the
14 draft interrogatory response attached as part of a Blackberry
15 readable e-mail. In one sense, well, they all relate to the
16 changed interrogatory response because the ones that have
17 the draft on them, that is what it is.

18 To the extent there is overlap like what I think
19 counsel for Google was talking about where you had something
20 to do with actual discussion of conception, for example, we
21 produced that overlapping e-mail. I believe that e-mail
22 is -- I need to find it here.

23 There was an e-mail from Jennifer Bent to Roy
24 Twersky on February 8th at 10:30 a.m. talking about a
25 document relating to conception. That document was one of

1 the documents that was discussed at the meeting. Well, we
2 did produce that.

3 The other documents that are here generally
4 relate to -- well, really relate to the preparation of the
5 fourth supplemental interrogatory response. During the meet
6 and confer on this issue, we were again hamstrung because we
7 were trying to explain in our view what these documents
8 were, but, again, Google would not indicate to us that if
9 we gave them any sort of a real description of what the
10 documents were, they would not use that as a waiver against
11 us, and then we would be back here on another ground.

12 I guess to summarize, we fully believe that we
13 complied with the order. We view this as just an attempt
14 I guess by Google to snatch most of Category C which the
15 Court denied them the relief from under the Court's order.
16 We read the order again as very clear that communications
17 relating to the preparation of the fourth supplemental
18 response were not part of what was included within the
19 waiver. That is what these documents are. That is really
20 all I can say.

21 Google made a few other points. They attach
22 a piece of one of the other e-mails in trying to maybe
23 create a smoking gun on the SRI issue. That e-mail, and
24 then the e-mail that is attached to our letter, confirmed
25 what Mr. Twersky said in his deposition: that there was a

1 question as to what the legal meaning of conception was. We
2 provided that legal meaning to them. We think, here, this
3 is just an overreach by Google to try to get a second bite
4 at something that the Court already denied them.

5 THE COURT: Mr. Nelson, I think everybody agrees
6 it comes down to overlap. So I do want to make sure I fully
7 understand PUM's position.

8 In your letter, at page 2, I'm near the top of
9 the page, you write: "The remaining withheld communications
10 reflecting both attorney-client communications and work
11 product relate to PUM's preparation of its Fourth Supplemental
12 Response to Interrogatory No. 1, the category of communications
13 that the Court specifically denied Google."

14 Do the remaining eight withheld e-mails relate
15 solely to PUM's preparation of its Fourth Supplemental
16 Response to Interrogatory No. 1?

17 MR. NELSON: Let me try to figure out a way
18 to answer that sort of most accurately without waiving
19 privilege.

20 The majority of the e-mails are essentially
21 transmittals that would have the interrogatory's proposed
22 supplemental response attached to it. A couple of the
23 e-mails relate to a question about certain aspects unrelated
24 to conception in that proposed supplemental response. A
25 couple of the other ones relate to -- one relates to a

1 document that was -- I'm in a difficult position, your
2 Honor, because, again, if I go into these in too much
3 detail, I feel like I risk a waiver.

4 THE COURT: What do you think of the suggestion
5 that I review the eight e-mails in camera?

6 MR. NELSON: We are fine with that. I do not
7 think it is necessary, but we are certainly fine with that.
8 If I give a more detailed description here over the
9 telephone, I feel I risk a waiver, and so I am not sure --
10 and I do not want to misrepresent something to the Court in
11 case the Court finds for Google, and then they come back
12 and say, well, I said that something did not relate in any
13 way to the changed interrogatory and under some tortured
14 interpretation Google says it does.

15 THE COURT: It is just eight e-mails that are at
16 issue; correct?

17 MR. NELSON: Yes, it is.

18 THE COURT: Well, I am inclined to order you to
19 submit them for in camera review. Is there anything further
20 you want to say before I turn back to Mr. Perlson?

21 MR. NELSON: No, your Honor.

22 THE COURT: Mr. Perlson, you have heard my
23 inclination. Is there anything else you want to add?

24 MR. PERLSON: No, your Honor. Thank you.

25 THE COURT: Then I think given that we have

1 spent a quite a lot of time collectively on these issues and
2 we at least have narrowed it down to eight e-mails, and
3 counsel for plaintiff is in a difficult position in trying
4 to represent further what they say without risking a further
5 waiver, although review in camera is something I do not have
6 time to do very often, I think under the circumstances it is
7 the appropriate way to resolve this dispute, hopefully, once
8 and for all.

9 I'm hereby ordering the plaintiff submit for in
10 camera review a copy of the eight e-mails and to get those
11 into us by the end of the day tomorrow.

12 Is there anything further we need to discuss at
13 this time, Mr. Perlson?

14 MR. PERLSON: No, your Honor. Thank you.

15 THE COURT: Mr. Nelson?

16 MR. NELSON: No, your Honor. Thank you.

17 THE COURT: Thank you very much. Good-bye.

18 (Conference ends at 3:30 p.m.)
19

20 I hereby certify the foregoing is a true and accurate
21 transcript from my stenographic notes in the proceeding.

22 /s Brian P. Gaffigan
23 Official Court Reporter
24 U.S. District Court
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