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May 13, 2011

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Judge Leonard P. Stark
J. Caleb Boggs Federal Building
844 N. King Street, Unit 26, Room 6124
Wilmington, DE 19801-3556

REDACTED
PUBLIC VERSION

Re: Xerox Corp. v. Google, Inc., et al., C.A. No. 10-136-LPS

Dear Judge Stark:

Defendants' request to extend the schedule indefinitely is simply a thinly veiled attempt to reargue their prior request for a longer schedule, which this Court denied in February. Unable to state a plausible reason for changing the Court-ordered schedule during their meet-and-confer with Xerox, Defendants now manufacture specious justifications out of purported discovery delays. None of these pretexts withstands scrutiny, and Defendants' request should be denied.

Last year, the Court vacated much of the prior schedule and later invited the parties to submit new scheduling proposals. Although Defendants' schedule proposed a five-month interval between *Markman* briefing and expert reports (*see* D.I. 99 at 4, 7), the Court chose a more streamlined schedule, with the *Markman* hearing on May 19, close of fact discovery on July 1, exchange of expert reports from July 29 to September 9, close of expert discovery on September 23, and opening briefs on dispositive motions on October 21. (*See* D.I. 115.) This schedule gave a window of 10 weeks between the *Markman* hearing and expert reports.

On April 21, Defendants contacted Xerox to again seek a substantial delay in the schedule. (*See* Ex. A at 1-2.) Under Defendants' new proposal, expert discovery would not commence until 45 days after a *Markman* order, with all subsequent dates pushed back accordingly. The only reason Defendants gave for this change was that the Court was unlikely to issue a *Markman* order by the time opening expert reports were due. Xerox replied the next day by noting that the Court had set the dates for expert discovery and dispositive motions when it set the date for the *Markman* hearing, and nothing had changed since then that would warrant revising the schedule. (*Id.* at 1.) Defendants then requested a meet-and-confer, but did not offer any other reasons for their proposed change in the schedule. (*See* Ex. B.)

This Court stated in February that it was setting a new, more expedited schedule both because Xerox had withdrawn one of its patents and because, "importantly, [the parties had] a new judge". (Ex. C at 8:20-9:13.) "Given my schedule and the way I want to go about things, the schedule that the plaintiff proposed is more consistent with those factors than the schedule that you all had in place earlier." (*Id.* at 9:10-13.) Indeed, with only one patent in suit, there are relatively few claim construction issues for the Court to resolve, and it is perfectly feasible for

{00516897;v1}

experts to provide alternate opinions depending on how a given claim term may be construed in the Court's *Markman* order. Thus, there is no reason to alter the established schedule further.

Defendants now try to manufacture reasons to change the schedule by trotting out specious claims involving fact discovery—claims they did not raise until two days before filing their opening letter brief on this issue. (Ex. D.) None of these claims withstand scrutiny.

1. Documents: Defendants argue that the Court should extend fact discovery because Xerox has delayed in producing documents. But roughly 95% of all documents Xerox has produced were produced by December 28, 2010. Since then, Xerox has made only three types of productions to Defendants: (i) a few hundred documents from the personal files of the '979 Patent inventors (who left Xerox 11 years ago), which Xerox promptly reviewed and produced; (ii) roughly 1,500 documents produced after re-review and finalization of Xerox's privilege log (many consisting of unredacted versions of previously produced documents); and (iii) a handful of miscellaneous documents of which Xerox was not previously aware, which also were reviewed and produced promptly after Xerox learned of them. These limited productions by no means constitute "critical documents" as Defendants claim, and they stand in stark contrast to the tens of thousands of documents each Defendant has produced over the past several months alone.

To weave the fiction that Xerox delayed productions, Defendants point to two specific documents, neither of which has the significance Defendants ascribe to it. First, Defendants contend that a lone presentation given by Yutaka Yamauchi (Ex. E) "suggests that he may be a co-inventor of the patent". But this presentation, produced shortly after it was received from a '979 inventor, contains virtually the same information as earlier presentations given by the '979 Patent inventors that Defendants have had for months. (*Compare* Ex. E with Exs. F & G.) As the presentation clearly states, Mr. Yamauchi was only a summer intern. He did not come up with the ideas in the presentation, on which he worked only under the supervision of the '979 inventors. (*See* Ex. H at 136:11-137:6 ("Q. Now, does that—does Slide 6 reflect any of Mr. Yamauchi's ideas or were those all your ideas? A. The slide does not reflect any ideas from Mr. Yamauchi. These are ideas that both Dr.—Mr. Grefenstette and I had, and Mr. Yamauchi operated under my instruction.")) And although Defendants complain that Mr. Yamauchi had left Xerox by late 2010, that was months before Defendants noticed their first depositions. Defendants' attempt to turn an intern into a co-inventor based on a single presentation that merely restates the actual inventors' prior work is unavailing and provides no basis for delay.

Next, Defendants cry foul because six weeks ago they received an 11-page Xerox "Invention Proposal Form" ("IP Form", Ex. I), which shows a conception date for the '979 Patent and

REDACTED

REDACTED But the '979 Patent's novelty is precisely in its unique combination of known technologies to enable the automatic generation of precise queries. As the Supreme Court has recognized, "inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known". *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418-19 (2007). The comment to which Defendants point is thus a red herring. Defendants' pretextual attempt to impose delays based on this IP Form is even more disingenuous given that they did not request to depose the manager who authored the comment, Christer Fernstrom, until this past Monday—over 5 weeks after Defendants used the IP Form in the depositions of the '979 inventors.

2. Witnesses: Defendants claim that Xerox has delayed in disclosing the relevance of potential witnesses, including Mr. Fernstrom. Again, Defendants omit key facts. In October 2010, Xerox disclosed on its document custodian list each individual named in Defendants' letter (with the exception of Mr. Yamauchi and other summer interns who left no files). (Ex. J at 11.) In fact, three months ago, on February 16, 2011, Xerox provided an updated, narrower list of custodians of '979 Patent-related documents, including Ms. Hubert, Mr. Gastaldo and Mr. Fernstrom. (Ex. K at 1.) Xerox also told Google that these individuals "conducted relevant work only at Xerox's research facility in Grenoble, France". (*Id.*) Indeed, Defendants have known since the very beginning of the case that the '979 Patent was developed in France. And although Defendants know that this work took place over a decade ago, they have not made a single inquiry regarding the employment status of any custodian except for the inventors. Defendants thus cannot credibly maintain that they have been caught off guard by having to contact potential witnesses abroad.

Defendants complain that Mr. Chuat and Mr. Gastaldo cannot be deposed until late June. But with travel time from and to France, preparation time, etc., a deposition in New York essentially requires each witness to sacrifice a week of his time. Given personal and professional commitments, late June was the earliest practicable time. Even so, the proposed deposition dates are within the existing timeframe for fact discovery. In crying unreasonable delay, Defendants also fail to note that when Xerox requested Defendants' depositions on February 1 and 7, 2011 (Exs. L & M), Defendants did not make their witnesses available until April 7 and May 3-6.

Finally, Defendants claim that they must somehow wait before taking additional discovery on conception and reduction-to-practice issues until Xerox answers recently-served interrogatories seeking rebuttals of Defendants' (deficient) invalidity contentions. This claim is baseless. Nothing in invalidity rebuttals will alter conception and reduction-to-practice dates and facts. Xerox disclosed this information no later than March 29 (Exs. N, O), and it was a subject of Dr. Shanahan's deposition on April 1 (*see* Ex. H at 158:17-176:21). Defendants further claim that they may wish to re-depose Dr. Shanahan concerning "another version of source code" received before his deposition. In fact, this code was a "snapshot" of the same source code Xerox had produced months earlier, simply taken on a different day. Furthermore, Defendants have made no such request in the past six weeks. If they do, Xerox will consider the request and work promptly to schedule a deposition of appropriate scope, if necessary. Defendants cannot convert their delay in requesting a potential deposition into a valid reason to delay the schedule.

3. IPValue: Defendants also attempt to justify further delay by pointing to outstanding document productions from Xerox's third-party licensing agent, IPValue. But the vast majority of relevant IPValue documents are communications between IPValue and Xerox, and thus were produced long ago to Defendants by Xerox, or are privileged. What remains are isolated internal documents at IPValue, which Defendants apparently hope will reveal opinions about the '979 Patent. But IPValue employees are not parties, not inventors, not experts, and they have not had access to final claim constructions in this case or Defendants' confidential information concerning the accused products. As with their other claims, Defendants' contention that the case should be delayed in order to complete this marginal discovery is mere pretext.

Defendants have shown no reason why this Court should alter the existing schedule, and Defendants' requested relief should be denied. In the alternative, we respectfully submit that an extension of one month would be more than adequate to address the issues raised.

Respectfully,


/s/ Lauren E. Maguire

Lauren E. Maguire

Attachments

cc: Richard L. Horwitz, Esquire (hand delivery; w/attachments)
David A. Perlson, Esquire (via electronic mail; w/attachments)
Jack B. Blumenfeld, Esquire (hand delivery; w/attachments)
Matthew B. Lehr, Esquire (via electronic mail; w/attachments)
Richard J. Stark, Esquire (via electronic mail; w/attachments)

EXHIBIT A

Re: Xerox v. Google 

Scott Leslie to: Andrea P Roberts

04/22/2011 11:27 AM

Cc: "ahale@cravath.com", "aharasymiak@cravath.com",
"AMayo@ashby-geddes.com", "Fenwick, Anthony I.", "Lisson, David", "Moore,
David E.", Google-Xerox, "jblumenfeld@mnat.com", "Brodsky, Jeremy",
Bcc: Xerox033

Andrea -

Xerox declines Defendants' proposal to delay the schedule ordered by the Court in February. As you know, Judge Stark set the dates for expert discovery and dispositive motions at the same time he set the dates for the *Markman* briefing and hearing. Since then, nothing has occurred that would warrant postponing any of those dates.

Best,

Scott

Scott A. Leslie
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New York, NY 10019
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(212) 474-3700 (fax)

Andrea P Roberts Counsel, I write regarding the expert discovery d... 04/21/2011 12:57:13 PM

From: Andrea P Roberts <andreaproberts@quinnemanuel.com>
To: Scott Leslie <SLeslie@cravath.com>, "aharasymiak@cravath.com" <aharasymiak@cravath.com>, "ahale@cravath.com" <ahale@cravath.com>, Richard Stark <RStark@cravath.com>, "AMayo@ashby-geddes.com" <AMayo@ashby-geddes.com>, "Imaguire@ashby-geddes.com" <Imaguire@ashby-geddes.com>
Cc: Google-Xerox <Google-Xerox@quinnemanuel.com>, "Horwitz, Richard L." <rhowitz@Potteranderson.com>, "Moore, David E." <dmoore@potteranderson.com>, "Fenwick, Anthony I." <anthony.fenwick@davispolk.com>, "Lisson, David" <david.lisson@davispolk.com>, "Brodsky, Jeremy" <jeremy.brodsky@davispolk.com>, "jblumenfeld@mnat.com" <jblumenfeld@mnat.com>, "mnoreika@mnat.com" <mnoreika@mnat.com>
Date: 04/21/2011 12:57 PM
Subject: Xerox v. Google

Counsel,

I write regarding the expert discovery deadlines in the February 15, 2011 Scheduling Order. Under the current schedule, opening expert reports are due on July 29, regardless of whether the Court has issued an order on claim construction. Based on the Court's current schedule, it seems unlikely that we will have a claim construction order before that date. Accordingly, we believe it would make more sense for the expert discovery and dispositive motion deadlines to trigger off of the date the Court issues its claim construction order. Defendants suggest the following:

Opening expert reports: due 45 days after claim construction order

Rebuttal expert reports: due 30 days after service of opening expert reports

Reply expert reports: due 21 days after service of rebuttal expert reports

Expert depositions: to be completed within 30 days after service of reply expert reports

Dispositive motions: due within 30 days of the close of expert discovery. No case dispositive motion under Rule 56 may be filed more than ten (10) days before this date without leave of Court.

We look forward to Xerox's thoughts.

Thanks,

Andrea


Andrea Pallios Roberts

Quinn Emanuel Urquhart & Sullivan, LLP

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EXHIBIT B

Re: Xerox v. Google 

Scott Leslie to: Andrea P Roberts

04/28/2011 10:50 PM

Cc: "ahale@cravath.com", "aharasymiak@cravath.com", "Fenwick, Anthony I.",
"Lisson, David", "dmoore@potteranderson.com", Google-Xerox,
"rhorwitz@potteranderson.com", Richard Stark, jday, Imaguire, AMayo,
jblumenfeld, mnoreika
Bcc: Xerox033

Andrea -

I write in response to your selective discussion of the issues raised on Tuesday's call.

Xerox's position concerning Defendants' effort to delay the schedule is simple. The Court set the current schedule in February, including setting dates for the *Markman* briefing and hearing, as well as expert discovery and dispositive motions. Defendants can point to nothing that has changed since then. Accordingly, Xerox believes there is no basis for rearguing the scheduling order.

On the call, Google inquired whether Xerox's recent productions in any way reflected a failure to search document sources. We told you that they did not. Throughout discovery, Xerox has been entirely transparent concerning its document collection methodology, including the reasons for the recent productions. However, when Google attempted to inquire into attorney thought processes concerning the production of individual documents, we naturally declined to answer such questions.

Obviously, this situation is no way comparable the Defendants' ongoing late productions of tens of thousands of pages of thousands of documents almost five months after the deadline, reflecting Defendants' prior systemic failure to exercise due diligence concerning document custodians and search terms—all of which is thoroughly documented in prior correspondence. Given that disparity, Xerox does not accept Defendants' belated attempts to excuse either their delays or their lack of diligence, nor will Xerox cease its efforts to ensure that Defendants comply with their discovery obligations.

Accordingly, please let us know whether Defendants anticipate producing any more documents and, if so, the approximate volume and timing of those productions. Xerox anticipates that it will make one final production of documents in connection with the finalization of its privilege log. That production will consist of approximately 1,500 documents, though many will be replacements for documents Defendants already have received, with certain redactions removed. Xerox intends to make this final production early next week.

Finally, we have asked when Defendants will be in a position to exchange privilege logs and have yet to receive a reply. We would appreciate an answer to this question.

Best,

Scott

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(212) 474-3700 (fax)

Andrea P Roberts Andrei and Scott, I write to follow-up on yesterda...

04/27/2011 12:55:22 PM

From: Andrea P Roberts <andreaproberts@quinnemanuel.com>
To: "aharasymiak@cravath.com" <aharasymiak@cravath.com>, Scott Leslie <SLeslie@cravath.com>, "ahale@cravath.com" <ahale@cravath.com>, Richard Stark <RStark@cravath.com>
Cc: Google-Xerox <Google-Xerox@quinnemanuel.com>, "rhorwitz@potteranderson.com" <rhorwitz@potteranderson.com>, "dmoore@potteranderson.com"

<dmoore@potteranderson.com>, "Fenwick, Anthony I." <anthony.fenwick@davispolk.com>, "Lisson, David" <david.lisson@davispolk.com>

Date: 04/27/2011 12:55 PM

Subject: Xerox v. Google

Andrei and Scott,

I write to follow-up on yesterday's meet and confer. Regarding the case schedule, we explained that we believe it would be more efficient and useful were the parties to have the Court's claim construction order available to them before expert discovery and dispositive motion briefing. Xerox does not agree to alter the case schedule so that those deadlines trigger from the issuance of the claim construction order. Xerox, however, does not have any information that would suggest that the parties can expect to have a claim construction order before the July 29 deadline to exchange opening expert reports. As we indicated on the call, we may raise this issue with the Court in connection with the May 18 discovery teleconference.

We also asked if Xerox could give any further explanation for why key documents were produced on the eve of the inventor depositions. Xerox responded that its position is set forth in Scott's April 20 letter and Xerox refused to further elaborate, saying that Defendants' inquiry into Xerox's internal document collection efforts are "off limits." Google does not agree with Xerox's position and finds it peculiar given that Xerox pursued discovery on this very topic and has sent numerous letters seeking information regarding such efforts from Defendants. In any event, as we indicated on the call and to which you did not refute, we presume that in light of this position Xerox does not now expect Defendants to respond to inquiries regarding their document collection efforts.

Andrea Pallios Roberts

Quinn Emanuel Urquhart & Sullivan, LLP

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EXHIBIT C

02:59:00 1

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

2

3

XEROX CORPORATION,

- - -

CIVIL ACTION

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Plaintiff, Counterclaim
Defendant,

:
:
:

5

v.

:

6

GOOGLE, INC., YAHOO! INC., RIGHT
MEDIA INC., RIGHT MEDIA LLC,
YOUTUBE, INC., YOUTUBE, LLC,

:
:
:

8

Defendants.

NO. 10-136 (LPS)

9

- - -

10

Wilmington, Delaware
Thursday, February 3, 2011
TELEPHONE CONFERENCE

11

12

- - -

13

BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

14

APPEARANCES:

- - -

15

ASHBY & GEDDES, P.A.
BY: JOHN G. DAY, ESQ.

17

and

18

CRAVATH SWAINE & MOORE, LLP
BY: RICHARD J. STARK, ESQ., and
SCOTT A. LESLIE, ESQ.
(New York, New York)

20

Counsel for Xerox Corporation

21

22

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

23

and

24

25

Brian P. Gaffigan
Official Court Reporter

1 APPEARANCES: (Continued)

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5 (San Francisco, California)

6 Counsel for Google, Inc., YouTube, Inc.,
7 and YouTube, LLC

8
9 MORRIS NICHOLS ARSHT & TUNNELL, LLP
10 BY: MARYELLEN NORIEKA, ESQ.

11 and

12 DAVIS POLK & WARDWELL, LLP
13 BY: ANTHONY I. FENWICK, ESQ.
14 (Menlo Park, California)

15 Counsel for Yahoo! Inc. and Right Media, LLC

16 - oOo -

17 P R O C E E D I N G S

18 (REPORTER'S NOTE: Telephone conference took
19 place in chambers, starting at 3:02 p.m.)

20 THE COURT: Good afternoon, everybody. This is
21 Judge Stark. Who is there, please?

22 MR. DAY: Good afternoon, your Honor. On behalf
23 of the plaintiff Xerox Corporation, you have John Day at
24 Ashby & Geddes. With me on the line, Rick Stark from Xerox,
25 lead counsel from Cravath Swaine & Moore; and Rick may have
a couple of folks with him. I'll let him introduce them.

MR. STARK: Good afternoon, your Honor. Richard

1 leaving just one remaining patent, the '979 patent.

2 I say that by way of just setting the stage
3 for what is really the overarching dispute with respect to
4 the schedule; that is, essentially shall we do this in a
5 relatively shorter time frame or a relatively longer time
6 frame?

7 Xerox's position, your Honor, is that since the
8 case, assuming that it goes forward, would be substantially
9 simplified by being about only one patent, that there is no
10 reason it couldn't be done, assuming it suits your Honor's
11 schedule, such as to put it in position for trial on a
12 relatively shorter time frame, say, spring of 2012. And if
13 that was convenient for the Court, then I think all the
14 other dates kind of fall in place from that.

15 The defendant's view is that we should stick
16 with the October or November 2012 target trial date that was
17 set at the outset of this case when it was plain that it
18 would be, at that time, a two-patent, more products involved
19 type of case and a longer schedule was set at that time.

20 But I think in view of changes now, a shorter
21 schedule would be entirely appropriate, subject, of course,
22 to your Honor's convenience.

23 THE COURT: And you have requested oral argument
24 on the pending motion to stay; correct?

25 MR. STARK: Yes, your Honor.

1 Stark here, and with me is Scott Leslie.

2 THE COURT: Okay.

3 MR. MOORE: On behalf of Google and YouTube,
4 your Honor, Dave Moore at Potter Anderson. With me on the
5 line is David Perlson from Quinn Emanuel.

6 THE COURT: Okay.

7 MS. NOREIKA: Your Honor, Maryellen Noreika from
8 Morris Nichols for the Yahoo! and Right Media defendants;
9 and with me on the line is Anthony Fenwick at Davis Polk.

10 THE COURT: Okay. Is that everybody?

11 MS. NOREIKA: I believe so.

12 THE COURT: So I have a court reporter with me.
13 For purposes of the record, it is Xerox Corp. v Google Inc.,
14 et al., our Civil Action No. 10-136-LPS. This is the time
15 for our scheduling teleconference.

16 There were quite a few disputes here so I do
17 want to give the parties a chance to focus my attention on
18 those, and I'll start first with the plaintiff.

19 MR. STARK: Thank you, your Honor. Richard
20 Stark speaking.

21 Your Honor, as your Honor probably knows,
22 there is a pending motion by the defendants to stay the
23 case in view of reexam. In our response to that, among
24 other things, we have stated on Xerox's behalf that we
25 would withdraw one of the two patents in suit in this case,

1 THE COURT: Okay. Let me see what defendants
2 want to say. First, the Google, YouTube defendants.

3 MR. PERLSON: Yes, Your Honor. This is David
4 Perlson.

5 Your Honor, I suppose that while there are many
6 dates that are different, I think that the speed on a high
7 level is relatively along the lines that Mr. Stark said. I
8 mean I think that the issue here is that we had a case that
9 involved two patents and negotiated the schedule based on it
10 and now we have, for strategic reasons, plaintiff apparently
11 wants to drop one of patents, and that is not a reason to
12 redo the whole schedule.

13 We've been proceeding under the other schedule
14 and simply because your Honor has been assigned to it
15 doesn't change the mix. There should be no reason why our
16 settled expectations as to when we're going forward with
17 claim construction, when we're doing dispositive motions and
18 all the other things that we've been proceeding on for some
19 time shall, all of a sudden, be completely changed.

20 On a high level, that's our position.

21 THE COURT: Is there anything that the Yahoo!
22 defendants want to add?

23 MR. FENWICK: Your Honor, Tony Fenwick on behalf
24 of Yahoo! and Right Media.

25 The only additional facts I point out is that

1 there still remain, by plaintiff's count, seven accused
2 products in the case. If you look at the form of scheduling
3 order that has been submitted, the plaintiff does not seem
4 to contemplate any reduction in the amount of discovery that
5 is going to be done, the number of hours of deposition.

6 The number of interrogatories, all that stuff is in the
7 same amount as was done before. So that would suggest the
8 schedule that was entered previously remains appropriate.

9 MR. PERLSON: Your Honor, this is David Perlson.
10 One more thing that Mr. Fenwick is missing.

11 The discovery reminds me that while plaintiff
12 suggests this case is simpler and should be able to proceed
13 quickly, we have yet to receive contentions other than that
14 mimic the patents in suit, so they don't seem to be
15 proceeding along the same lines in that sense. That is
16 actually making things more difficult as we go forward.

17 I understand, obviously, that is not the dispute
18 that is in dispute to be heard today.

19 MR. STARK: Your Honor, Richard Stark speaking.
20 If I might just respond quickly to a couple of points
21 briefly.

22 On contentions we, of course, disagree. We
23 think we have given more than adequate contentions for the
24 stage of the case, identifying the products and reading the
25 claims against them and so on.

1 As for the amount of discovery, I think what
2 we've got in the proposed scheduling order is something
3 that really for convenience kept the same numbers of
4 interrogatories and hours of depositions as we had all
5 agreed on before, and I don't think either side discussed
6 whether that should be smaller. Defendants didn't raise
7 that with us.

8 I actually think those numbers could be cut
9 down, clearly could be cut down since we only have one
10 patent and a small number of products.

11 Our schedules, in terms of fact discovery, only
12 differ by I think a little less than six weeks, around six
13 weeks. It's not a major difference in terms of the amount
14 of time allotted for fact discovery, but I do think that
15 we could cut down the amount of activity that has to be
16 done in fact discovery.

17 So I think it's really a question of there is in
18 fact, assuming that we go forward, less to do in this case,
19 and it can be done faster. It just strikes me as odd and
20 not really consistent with the notion of dispensing justice
21 with alacrity to instead say, well, let's stick with the old
22 schedule and have trial sometime in late 2012. I just don't
23 think we need that much time, quite simply.

24 THE COURT: Okay. Thank you, counsel. Let me
25 tell you where we are.

1 The first thing is I will and hereby direct that
2 the parties submit a revised proposed scheduling order to us
3 by a week from today, no later than a week from today, that
4 will encompass the rulings and dates that I am about to give
5 you.

6 I am going to enter a schedule here. As you
7 will see, it will be a schedule that will take us through
8 case dispositive motions.

9 However, having said all that, the first date I
10 want to give you is I am going to grant the request for oral
11 argument on the pending motion to stay. We're going to have
12 oral argument here at court on February 28th, at 3:30 p.m.
13 So that will be arguments on the pending motion to stay.

14 The fact that I'm entering a schedule, or will
15 be after I get your submission next week, is not meant in
16 any way to decide the motion to stay, but I do want to get a
17 schedule in place in the meantime.

18 Going through the issues in dispute with respect
19 to the proposed scheduling order.

20 I'm largely going to go with what the plaintiff
21 has proposed, and that is for the fundamental reason that
22 I agree with the plaintiff that this case has changed in
23 two significant respects from the time that the earlier
24 scheduling order was negotiated and imposed:

25 One is that the plaintiff is withdrawing one of

1 the patents and plaintiff is now going to be bound by that
2 representation that it intends to withdraw the one patent,
3 so this is now a one patent case as opposed to a two patent
4 case.

5 Also, importantly, you have a new judge. When
6 you all negotiated and then entered the earlier scheduling
7 order, that was Judge Thyngge at a time that the case was
8 referred to Judge Farnan, but in June, everybody knew he was
9 retiring so you didn't actually have a District Court Judge.

10 Now, you do. Given my schedule and the way I want to go
11 about things, the schedule that the plaintiff proposed is
12 more consistent with those factors than the schedule that
13 you all had in place earlier.

14 So to the extent that affects settled expectations,
15 I don't think the expectations could reasonably have been
16 that settled given the unsettled situation here at the court
17 at the time that the schedule currently in place was
18 initially entered.

19 In the proposal that you resubmit next week, I
20 will expect to see that there is some reduction in the
21 overall discovery that is sought. I'll leave it to you all
22 in the first instance to meet and confer and negotiate on
23 that, but I think it follows from the logic of what the
24 plaintiff has proposed and what I am persuaded by that this
25 case can move a little more quickly, that there also is less

1 need for as much discovery as was earlier set forward. So
2 where there are dates in dispute, you are to go with the
3 plaintiff's dates in what you submit next week.

4 A couple other things to point out.

5 On page 4, with respect to expert reports, the
6 Court also agrees with the plaintiff that there should be a
7 provision here for reply expert reports from the party with
8 the initial burden of proof.

9 In terms of the claim construction hearing, that
10 is going to be on May 19th of this year at 10:00 a.m. which
11 I would note is roughly consistent with the time frame that
12 both sides propose for a Markman.

13 For all of the dates after paragraph 13, just
14 put down, "to be determined." We'll determine the date for
15 the pretrial conference, pretrial order and trial some time
16 further down the road in the case.

17 With respect to that, I should point out that
18 while this schedule is now a little bit accelerated from
19 where it was and it may be ready for pretrial conference and
20 trial more on the expected time that the plaintiff has in
21 mind, I'm not, at this time, guaranteeing I'll be able to
22 fit you all in for a pretrial conference and a trial in that
23 time frame. That will be subject to further developments
24 in this case and in the numerous other cases I'm scheduling.

25 I don't want to hear any more argument on any of

1 these matters, but I do want to make sure I'm clear on what
2 I have ordered and what I'm looking for by next Thursday.

3 Are there any questions, Mr. Stark?

4 MR. STARK: No, your Honor. All clear.

5 THE COURT: Okay. And Mr. Perlson?

6 MR. PERLSON: No questions, your Honor.

7 THE COURT: Mr. Fenwick?

8 MR. FENWICK: No, your Honor.

9 THE COURT: Okay. Thank you. We'll look for
10 your submission next week. Good-bye.

11 (The attorneys respond, "Thank you, your Honor.")

12 (Telephone conference ends at 3:16 p.m.)

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EXHIBIT D



RE: Xerox v. Google

Andrea P Roberts <andreaproberts@quinnemanuel.com> to: Sc
ott
Le 05/10/2011 05:53 PM

Cc: "ahale@cravath.com", "aharasymiak@cravath.com",
"Fenwick, Anthony I.", "Lisson, David",
"dmoore@potteranderson.com", Google-Xerox,

History: This message has been replied to and forwarded.

Scott,

Defendants intend to raise the schedule in their opening letter brief to the Court. In addition to the issue of altering the case schedule so that the expert discovery and dispositive motion deadlines trigger off of the Court's issuance of a claim construction order, it appears we also need to move the fact discovery deadline because Xerox witnesses are not available for deposition until very late in the discovery period. Specifically, Messrs. Chuat and Gastaldo are not available for deposition until the last 2 weeks of discovery and it will take Defendants additional time to schedule the depositions of Yamauchi and Hubert abroad. These depositions may themselves demonstrate the need for further discovery. Gastaldo, Yamauchi, and Hubert's relevant knowledge was not disclosed to Defendants until Xerox served its supplemental response to Defendants' Interrogatory No. 1 on the eve of the inventor depositions. Further, IPValue's document production is not yet complete and Defendants intend to depose IPValue employees and cannot do so until IPValue's document production is complete. This delay is not the fault of Defendants, as it is IPValue that took the positions, through Xerox's own counsel, that required Google to file a motion and successfully compel IPValue's production in California. If Xerox wishes to discuss the schedule further please let us know.

Thanks,

Andrea Pallios Roberts
Quinn Emanuel Urquhart & Sullivan, LLP

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From: Scott Leslie [mailto:SLeslie@cravath.com]

Sent: Thursday, April 28, 2011 7:58 PM

To: Andrea P Roberts

Cc: ahale@cravath.com; aharasymiak@cravath.com; Fenwick, Anthony I.; Lisson, David; 'dmoore@potteranderson.com'; Google-Xerox; 'rhorwitz@potteranderson.com'; Richard Stark; jday@ashby-geddes.com; lmaguire@ashby-geddes.com; AMayo@ashby-geddes.com; jblumenfeld@mnat.com; mnoreika@mnat.com

Subject: Re: Xerox v. Google

Andrea -

When you say that Defendants "may" raise the issue of their attempt to change the schedule "with the Court in connection with the May 18 discovery teleconference," we presume you mean that Defendants may ask the Court to make this a subject of the teleconference and will then submit an opening letter brief on this issue. Please let us know if that is incorrect.

Best,

Scott

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From: Andrea P Roberts <andreaproberts@quinnemanuel.com>
To: "aharasymiak@cravath.com" <aharasymiak@cravath.com>, Scott Leslie <SLeslie@cravath.com>, "ahale@cravath.com" <ahale@cravath.com>, Richard Stark <RStark@cravath.com>
Cc: Google-Xerox <Google-Xerox@quinnemanuel.com>, "rhorwitz@potteranderson.com" <rhorwitz@potteranderson.com>, "dmoore@potteranderson.com" <dmoore@potteranderson.com>, "Fenwick, Anthony I." <anthony.fenwick@davispolk.com>, "Lisson, David" <david.lisson@davispolk.com>
Date: 04/27/2011 12:55 PM
Subject: Xerox v. Google

Andrei and Scott,

I write to follow-up on yesterday's meet and confer. Regarding the case schedule, we explained that we believe it would be more efficient and useful were the parties to have the Court's claim construction order available to them before expert discovery and dispositive motion briefing. Xerox does not agree to alter the case schedule so that those deadlines trigger from the issuance of the claim construction order. Xerox, however, does not have any information that would suggest that the parties can expect to have a claim construction order before the July 29 deadline to exchange opening expert reports. As we indicated on the call, we may raise this issue with the Court in connection with the May 18 discovery teleconference.

We also asked if Xerox could give any further explanation for why key documents were produced on the eve of the inventor depositions. Xerox responded that its position is set forth in Scott's April 20 letter and Xerox and refused to further elaborate, saying that Defendants' inquiry into Xerox's internal document collection efforts are "off limits." Google does not agree with Xerox's position and finds it peculiar given that Xerox pursued discovery on this very topic and has sent numerous letters seeking information regarding such efforts from Defendants. In any event, as we indicated on the call and to which you did not refute, we presume that in light of this position Xerox does not now expect Defendants to respond to inquiries regarding their document collection efforts.

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