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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ERICH SPECHT, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 09 C 2572
GOOGLE, INC., et al.,	)	Chicago, Illinois
Defendants.	)	January 7, 2009
	)	9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff:	NOVACK & MACEY MR. ANDREW FLEMING MR. JOHN F. SHONKWILER 100 North Riverside Plaza Chicago, Illinois 60606 312-419-6900
For the Defendant:	GREENBERG TRAURIG, LLP MR. JEFFREY P. DUNNING MR. HERBERT H. FINN 77 West Wacker Drive Chicago, Illinois 60601 312-456-8400
For Motorola, Inc.:	STETLER & DUFFY, LTD. MR. JONATHAN M. CYRLUK 11 South LaSalle Street Chicago, Illinois 60603 312-338-0200

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**Court Reporter:**

**FEDERAL OFFICIAL COURT REPORTER  
MS. KRISTA FLYNN BURGESSON  
219 South Dearborn Street  
Chicago, Illinois 60604  
312-435-5567**

1 THE CLERK: 09 C 2572, Specht versus Google.

2 MR. FINN: Good morning, your Honor. Herbert Finn  
3 and Jeffrey Dunning on behalf of defendant, Google.

4 MR. DUNNING: Good morning, your Honor.

5 MR. FLEMING: And good morning, your Honor. Andrew  
6 Fleming and John Shonkwiler appearing on behalf of the  
7 plaintiffs.

8 MR. SHONKWILER: Good morning.

9 MR. CYRLUK: Good morning, your Honor. John Cyrluk  
10 appearing on behalf of nonparty subpoena recipient Motorola,  
11 Inc.

12 THE COURT: Okay.

13 I have a motion to quash nonparty subpoena prepared  
14 by Motorola.

15 MR. FINN: And there is also the continued motion to  
16 compel that is before the Court.

17 THE COURT: Right.

18 MR. FLEMING: And also, I believe, your Honor, just a  
19 status on discovery in general.

20 THE COURT: Yes.

21 Yesterday I believe I got -- or January 6th, I got  
22 delivered a supplement to the answers, I guess, in --

23 MR. FINN: That would be news to us, your Honor, we  
24 didn't supply it, and if plaintiff supplied it, we are not  
25 aware of it.

1 THE COURT: It is dated by letter January 6th, and  
2 says, Enclosed please find a courtesy copy with copies to  
3 all.

4 MR. FINN: Well, as I said, we are not aware of it,  
5 your Honor.

6 MR. FLEMING: I believe we sent them a courtesy copy  
7 of the transmittal letter.

8 THE COURT: It says you did.

9 MR. FINN: That is fine, I am not debating that, but  
10 I --

11 THE COURT: So, you are not prepared to argue whether  
12 or not that complies with the --

13 MR. FINN: Actually, I am prepared to argue, your  
14 Honor, and we believe it does not comply.

15 THE COURT: How do you know? You haven't seen it.

16 MR. FINN: I have seen the supplemental answers.

17 MR. FLEMING: We served those earlier.

18 THE COURT: Oh, okay.

19 MR. FINN: I was not aware that they provided a  
20 copy to the Court. I don't know what the transmittal letter  
21 said.

22 THE COURT: Well, I will read it to you so that you  
23 know:

24 Enclosed please find a courtesy copy of plaintiff's  
25 second supplemental answers to first set of interrogatories

1 propounded by Google, plaintiff's initial objections and  
2 initial answers, and first supplemental answers that were  
3 attached to defendant's motion to compel. Plaintiff's provide  
4 complete response to interrogatories as Exhibits 2, 3, and 7.  
5 Respective, the motion was entered and continued until  
6 Thursday, January 7th. Signed by John Haarlow, Junior.

7 MR. FINN: That is fine, your Honor.

8 THE COURT: Okay.

9 MR. FINN: I mean, I understood it to be just a  
10 transmittal.

11 But it is our position, Google's position, that the  
12 supplemental responses, the second supplemental responses,  
13 still are not compliant with the interrogatory requests.

14 If you take a look at -- if you have got it before  
15 you, on Page 7 --

16 THE COURT: Hold on.

17 What else do we have up, Wanda?

18 (Discussion held off the record.)

19 Can you stick around for a few minutes and let me run  
20 through the call?

21 MR. FINN: Sure.

22 MR. FLEMING: Happy to do that, Judge.

23 MR. CYRLUK: Your Honor, I just have to run up to  
24 Judge Castillo. I think I am second on his call.

25 THE COURT: Let me ask, are you asking to respond to

1 his motion?

2 MR. FLEMING: Yes, I would like to respond.

3 THE COURT: Let's take care of you then.

4 How long out would you like?

5 MR. FLEMING: I would actually like 28 days. I am  
6 going to be out of the country this month and we are filing  
7 our reply to the motion to dismiss.

8 I mean, I would prefer to --

9 THE COURT: You won't get your information until  
10 after I rule.

11 MR. FLEMING: I'm sorry, your Honor?

12 THE COURT: You won't get any information from him  
13 until after I rule.

14 MR. FLEMING: I understand that, your Honor.

15 MR. CYRLUK: We would like to resolve this as soon as  
16 possible, Judge.

17 THE COURT: Do you have any objection? He wants 21  
18 days.

19 MR. CYRLUK: 21 days, that is fine.

20 THE COURT: And you want 7 days to reply then?

21 MR. CYRLUK: Sure, and if I need more, I will contact  
22 them.

23 THE COURT: All right.

24 21 days, 7 days to reply, and set it for ruling about  
25 3 weeks after that.

1 THE CLERK: The 28th of January, February 4th, and  
2 then ruling on the 25th of February.

3 Is that on the motion to quash?

4 MR. CYRLUK: Yes.

5 THE COURT: To quash the subpoena for Motorola,  
6 nonparty Motorola.

7 MR. CYRLUK: Thank you.

8 THE COURT: All right.

9 So, let me run through the call. It will only take  
10 about 10 minutes.

11

12 (The above-mentioned case was passed and was later  
13 recalled as follows:)

14

15 THE CLERK: 09 C 2572, Specht versus Google.

16 MR. FLEMING: Good morning, again, your Honor.

17 Andrew Fleming and John Shonkwiler on behalf of the  
18 plaintiffs.

19 MR. SHONKWILER: Good morning.

20 MR. FINN: And Herbert Finn and Jeffrey Dunning on  
21 behalf of defendant Google.

22 THE COURT: All right.

23 MR. FINN: Your Honor, we are here on the continued  
24 motion to compel. We were discussing whether Google believes  
25 the second supplemental answers are responsive, and it is

1 Google's contention that they are not. They are frankly  
2 little better than what was given previously.

3 I started to direct the Court's attention to a  
4 specific interrogatory as an example. If the Court wants to  
5 go through it in that manner, we are prepared to do so.

6 THE COURT: Well, why don't we start doing that and  
7 then see.

8 MR. FINN: Okay.

9 MR. FLEMING: I mean, can I give a little bit of an  
10 overview as to what we have done? We believe it was  
11 mischaracterized as precious little. But what we have done,  
12 Judge, is --

13 MR. FINN: I don't believe the words "precious  
14 little" came out of my mouth, but continue, Mr. Fleming.

15 MR. FLEMING: What we have done, Judge, is we did --

16 One of the things they wanted us to find out is the  
17 dates, month and year, of sales of products and services. So  
18 we have gone through, we have identified the specific  
19 documents from which that information could be ascertained, we  
20 have identified the contracts with the customers, we have  
21 identified all of the invoices that were submitted to the  
22 customers, we have identified the check register showing when  
23 funds were received from customers and deposited into the  
24 account, we have produced the Quick Book files, which shows  
25 that same information, and we have produced the tax returns.



1           So, we have given them everything that would show a  
2 sale of products and services and the specifics of when money  
3 was received for those sales and services.

4           In terms of identifying the types of products and  
5 services that we have given, the invoices themselves are very  
6 detailed. I know Mr. Finn raises an issue in an E-mail to us  
7 where he complains that we haven't described the types of  
8 services.

9           I pulled out one example of one invoice which  
10 specifically shows that when invoices were sent to customers,  
11 your Honor, Mr. Specht broke out, much like an attorney's  
12 bill, the day, the amount of time that was spent, and the  
13 specific computer software related services that he was  
14 providing to the customer.

15           So, they have a tremendous amount of detail as to the  
16 actual specifics as to what he was doing.

17           In terms of the give-aways, your Honor will recall  
18 that Mr. Specht would give away a lot of software, products,  
19 and services, in the hopes of developing more business.

20           In the interrogatory answer, and the one that Mr.  
21 Finn refers to, Page 8, we give a whole substantial detail  
22 here, Judge, concerning specific people to whom services were  
23 provided on a discounted or free basis. We have identified  
24 specific invoices that reflect the discounts. We have  
25 described in that answer -- We have listed everybody, Judge,

1 that was given free give-aways. We have given the specifics  
2 as to discounts. And we are in the midst now of producing  
3 E-mails that would specifically show, for example, what Mr.  
4 Specht was providing, IT and troubleshooting services, that  
5 would specifically show what he was doing.

6 Let me just spend one minute on that. In terms of  
7 the document production, we are so way ahead of Google on  
8 this, it is unbelievable.

9 MR. FINN: Actually, Google has --

10 THE COURT: Wait, wait, wait.

11 One of my Cardinal rules is that two wrongs don't  
12 make a right.

13 MR. FLEMING: I understand that, Judge.

14 THE COURT: And whatever shortcomings Google may  
15 have, may be guilty of, until there is a motion before me --

16 MR. FLEMING: Sure.

17 THE COURT: (Continuing) -- I will not entertain it.

18 MR. FLEMING: Let me just tell you what we have done,  
19 your Honor.

20 We have produced all of our paper documents, over  
21 10,000 pieces of paper. We have identified, of the electronic  
22 stored information, the E-mails. We have identified over  
23 150,000 E-mails. We have produced 100,000 pages of those  
24 E-mails to Google.

25 MR. FINN: That is not accurate.

1 THE COURT: Let him finish.

2 MR. FLEMING: That is accurate, Judge.

3 MR. FINN: No.

4 THE COURT: I am not suggesting it is not, at this  
5 point.

6 MR. FLEMING: All right.

7 We have identified approximately 150,000 E-mails. We  
8 have produced over 100,000 pages of E-mails to Google. We are  
9 on target to complete our production of all of the electronic  
10 stored information, my guess is, within the next 30 to 45  
11 days.

12 Once we have done that, Judge, we will have given  
13 them in terms of written discovery everything they have asked  
14 for, everything that they have asked for.

15 THE COURT: Okay.

16 MR. FINN: If I may, your Honor, that is an overview  
17 from plaintiff's perspective. Defendant's perspective is  
18 obviously a bit different.

19 While counsel may have identified -- and this is  
20 frankly getting off the way we were going through the  
21 interrogatories, but we will take that course for just a  
22 minute.

23 While plaintiff may have identified hundreds of  
24 thousands of pages of electronic documents, they have not  
25 produced hundreds of thousands of pages.

1           In fact, in an E-mail this week I sent them I told  
2 them --

3           THE COURT: He said they identified 150,000 E-mails  
4 and they produced 100,000 pages of E-mails.

5           MR. FINN: And that is not accurate.

6           They are having what has been referred to as  
7 technical difficulties with their electronic production. They  
8 have referred to electronic production in these interrogatory  
9 responses that we don't have.

10           I asked them on a phone call yesterday -- excuse me,  
11 two days ago, for those documents, and they said they don't  
12 know when they can turn them over. I said, Well, can you at  
13 least turn over those documents that you referred to in the  
14 interrogatory responses, and --

15           MR. FLEMING: Which they --

16           MR. FINN: (Continuing) -- and they said, No, we  
17 can't, we won't do it out of ordinary course.

18           THE COURT: Let him finish.

19           MR. FINN: So, I don't know what he is referring to  
20 by 100,000 pages.

21           77,000 pages I identified, and they said, We are not  
22 getting it to you.

23           MR. FLEMING: We gave it to them yesterday.

24           THE COURT: This is getting to be one of these cases  
25 where I am not sure you are both on the same planet.

1 He said they gave you 100,000 pages and you said --  
2 MR. FINN: I just heard from Mr. Fleming that I had  
3 them yesterday.

4 We had a 9:00 o'clock hearing. When I left at 7:00  
5 o'clock last night, I didn't have them.

6 So, maybe they were messengered over this morning and  
7 he can no represent we have them.

8 MR. FLEMING: Well, Mr. Haarlow is here and I can ask  
9 him right now.

10 MR. FINN: In any event, if we can get back to what  
11 the motion to compel is on, that is the interrogatory  
12 responses.

13 THE COURT: Right.

14 MR. FINN: Mr. Fleming referred to interrogatory  
15 Number 5, and how he identified specific facts and specific  
16 sales.

17 Interrogatory Number 5 is a pretty simple  
18 interrogatory, it asks for sales by month and year for each  
19 respective plaintiff. There are three of those, three  
20 respective plaintiffs.

21 Now, in the initial response, which the Court has  
22 attached to the motion, and I don't know if the Court has it  
23 in front of it, they identified over \$600,000 worth of sales  
24 amongst the three plaintiffs.

25 So they originally, when Mr. Murphy was here

1 representing the plaintiffs, they originally went through the  
2 exercise of calculating the information. We asked, Break it  
3 down as the interrogatory asks. We have yet to see that, your  
4 Honor.

5           We get information -- this interrogatory response is  
6 four pages. It complains on Page 9 and Page 10 that they  
7 can't really give it to us because we haven't identified how  
8 we want it, whether we want it on a cash sale, an accrual  
9 basis and, you know, the general accounting principles  
10 indicate there are differences there.

11           Frankly, I don't care. However they keep the  
12 corporate books is how we will take them.

13           Yet also they point to documents and they point to  
14 proposals. Well, I don't know if a proposal was a sale. They  
15 point to correspondence. Again, I don't know if that is a  
16 sale. They point to discounted or free services. Well, which  
17 is it, discounted or free? Did it generate money? I don't  
18 know because they haven't given me documents.

19           I still don't have documents for sales from '05, '06,  
20 '07, '08, or '09. They point to accounting records and tax  
21 returns. These businesses did things other than computer  
22 services, and the tax revenue isn't going to tell me what  
23 sales they made with respect to the Android Data mark per  
24 plaintiff/per year as requested in the interrogatory.

25           MR. FLEMING: Your Honor --

1 MR. FINN: That is just one example.

2 MR. FLEMING: Let's take a look at Page 9. They are  
3 listed here. Mr. Finn has to look at the documents.

4 If we look at Page 9, the first paragraph, your  
5 Honor, we go through that and we list the invoices, the check  
6 register, the Quick Book files, and the tax returns. We give  
7 him the specific Bates label of those documents and --

8 THE COURT: That is not what they are asking for.

9 They are asking for the dollar amount of goods and/or  
10 services sold by month and year.

11 MR. FINN: And by plaintiff related to a mark.

12 MR. FLEMING: And the way you get that, Judge, is you  
13 look at the invoice, you match it up with the check register,  
14 and --

15 THE COURT: Why should they have to do that? You  
16 should just list that and then --

17 MR. FINN: Not to mention, your Honor, they reference  
18 a Quick Book file. If it is that simple, they have got the  
19 electronic data, push the button and have it total it.

20 MR. FLEMING: Well, your Honor, now wait a second.  
21 What we have given them is what --

22 THE COURT: I read this answer and I would assume  
23 that there was no dollar amount, that you gave away goods and  
24 -- or that would be --

25 MR. FINN: It says, Discounted or free. I don't know

1 if it is discounted or free.

2 MR. FLEMING: Right here we are dealing with the --  
3 let's stay on one topic at a time. We are dealing with sales,  
4 not discounts or give-aways, we are dealing with sales.

5 MR. FINN: You are the one that threw the discounts  
6 in.

7 THE COURT: Wait, wait, wait.  
8 You both can't talk at once.

9 MR. FINN: I apologize, your Honor.

10 MR. FLEMING: We have given him the invoices. We  
11 have given him the check registers. We have given him the  
12 Quick Book files. So he can tell, Here is the invoice for the  
13 cost of services, this is where the money is.

14 THE COURT: But that doesn't --

15 MR. FLEMING: Judge, that would require us to -- we  
16 are entitled to answer this interrogatory by providing him the  
17 documents from which the answer could be ascertained. We have  
18 not put together that analysis. But he can read those  
19 documents, and the burden is the same on him as it is on us,  
20 to look at the invoices, to match them up with the check  
21 register, and determine when did the money come in for that  
22 particular product or service.

23 We have met our obligations, your Honor, under the  
24 rules, and I will say, and I know that you don't want to get  
25 into tit for tat, but that is exactly how Google answered us.



1 THE COURT: I disagree.

2 It seems to me when you ask for a specific dollar  
3 amount of goods or services sold, licenses distributed by each  
4 plaintiff, that the answer should say, Plaintiff -- whatever  
5 the first one is.

6 MR. FINN: The individual, Eric Specht.

7 THE COURT: Yes.

8 MR. FINN: We can take the first one.

9 THE COURT: Okay.

10 That he sold X number of goods, dollars worth of  
11 goods, or services, in January of 2000 whatever, blah blah  
12 blah blah. It doesn't ask for the -- I mean, then they can  
13 get the documents and it would be up to them, presumably, to  
14 verify that your answers are correct.

15 MR. FINN: And part of the difficulty, your Honor, is  
16 even if we did go through the documents as plaintiffs are  
17 proposing, again, I don't have invoices or documents for the  
18 years '05, '06, '07, '08, and '09.

19 Also, I don't have an indication from them that --  
20 they are saying plaintiffs, jointly. We have asked for each.  
21 Many of these interrogatories ask for each, and never have  
22 they taken a position that a sale by one is a sale by all.  
23 Now, if that is their position, then there are other issues  
24 that that raises.

25 MR. FLEMING: Frankly, Judge, this issue about the

1 plaintiffs -- and this is the first time they have raised it,  
2 it wasn't in their motion, but it is a pretty easy issue to  
3 answer.

4 That is prior to '02, the sales were from Android  
5 Data Corporation. And then after '02, it was Android's  
6 Dungeon, Inc. Mr. Finn knows that. He knows that. That is  
7 no great secret or mystery.

8 MR. FINN: That is not what the documents reflect.

9 MR. FLEMING: Judge, if I can get back to the point,  
10 which is, we don't have the information by date, month, and  
11 year. What we do have are the documents from which that  
12 information can be ascertained.

13 We have specifically identified those documents.

14 THE COURT: Your client doesn't maintain a ledger  
15 whereby they --

16 MR. FLEMING: Well, right. You look at the check  
17 register, you look at the Quick Book files, you look at the  
18 tax returns, and you look at the invoices. Then those are --  
19 that information will tell you -- that information will tell  
20 you when sales were made, when money was received.

21 Absolutely. The tax returns will show that.

22 MR. FINN: Your Honor, Mr. Fleming just referred to  
23 the Android's Dungeon, Inc., as a corporation, and --

24 THE COURT: Do they have any business other than  
25 Android?

1 MR. FINN: Yes, they do.

2 Android's Dungeon, Inc., is also used by Megan  
3 Specht, plaintiff's wife, with regard to a real estate  
4 business, and frankly, that is what has been happening, and  
5 what the revenue has been in '05, '06, '07, '08, '09. That is  
6 why they don't want to give us the information, because the  
7 information is going to show that there are zero sales under  
8 that mark for the corporation.

9 THE COURT: I think you are going to have to redo  
10 Number 5.

11 Now, what about the other ones?

12 MR. FINN: Turning to interrogatory Number 1, this  
13 one, as the Court may recall, wherein their initial response  
14 they had 15 or so pages of former/current customers,  
15 former/current suppliers, former/current vendors, prospects,  
16 all sorts of information they say, and you specifically  
17 directed them to provide dates.

18 We are coming back to an answer that ignores each and  
19 every one of those prior responses, those prior 15 pages, and  
20 doesn't provide us dates.

21 MR. FLEMING: I am not following in answer to  
22 interrogatory Number 1 what Mr. Finn is referring to.

23 THE COURT: That doesn't specifically ask for dates  
24 and --

25 MR. FINN: Well, frankly, your Honor, I am referring

1 to our last hearing where Mr. Shonkwiler pointed out that they  
2 had a list of 15 pages of customers, I can show you the actual  
3 response if the Court would like to see it, but they had four  
4 pages of customers, I believe, another five pages of  
5 prospects, and you instructed them to provide dates of when  
6 they were customers.

7           The caption is, Former or Current Customers. I don't  
8 know, just because an invoice says there was a customer then,  
9 does that mean they are still currently a customer? I don't  
10 know. I would like to know.

11           If they are going to represent that the only time  
12 they are a customer is when an invoice is generated, I would  
13 accept that, that is some information. But right now, all I  
14 have is a list of former and prior customers, and they went  
15 off on a different tangent as to some advertising.

16           MR. FLEMING: I am struggling to see where the  
17 question is about, Identify current list and former customers.  
18 I don't see that in interrogatory Number 1.

19           I will defer to Mr. Shonkwiler who wants to make a  
20 point.

21           MR. SHONKWILER: Only that the information, again,  
22 that is provided is absolutely everything that we know to  
23 date, absolutely everything, and where the information -- for  
24 us to give more on paper in writing would require us to sit  
25 down in a conference room with the documents and spend hours

1 going through them and reaching some analysis.

2 THE COURT: Well, you are going to have to do that.

3 MR. SHONKWILER: Before we go to trial we will, and  
4 so will Google.

5 But in response to the interrogatory answers I submit  
6 no, your Honor, not under Rule 33(d), or not -- yes, under  
7 33(d).

8 MR. FINN: This was the same argument previous, your  
9 Honor, and we specifically talked about this list, and you  
10 said, Give them dates.

11 MR. SHONKWILER: Let me just --

12 THE COURT: I have discretion to order more detailed  
13 responses, and I think based upon what I understand Google's  
14 intent is for their discovery, they need this specific  
15 information, and I think they are entitled to it.

16 I will order that you be specific as to dates, dollar  
17 amounts, and customers for services, which you can take from  
18 your documents. But I think they are entitled to that  
19 information.

20 MR. SHONKWILER: Your Honor, so that we don't go  
21 through another round of this because, I mean, we spent an  
22 awful lot of time going through every page of documents that  
23 we have seen and has yet been produced, and even documents we  
24 were in the course of producing, to identify every page, and I  
25 mean, literally hundreds and hundreds of pages, one at a time

1 by Bates numbers, but to --

2 THE COURT: You have to do that.

3 What they are asking for is information. For  
4 example, Number 9, Identify by year or customer for vendors of  
5 and/or supplies for any product or services offered, sold,  
6 licensed, or distributed by each plaintiff in association with  
7 the Android data trademark. And I think there is another one.  
8 And that is relatively simple. Just go over your financial  
9 documents, you made sales of whatever it is that you attached  
10 the trademark on, and add them up by month, and then they will  
11 know, and then they can do all the work trying to check your  
12 accuracy.

13 MR. FLEMING: Just so we are clear, what we are  
14 looking for is date, amount of sales to plaintiff's customers  
15 of the products and services involving the Android trademark;  
16 is that right?

17 THE COURT: Right, right.

18 And then identify what the product was, I don't know  
19 how many different products they had, but it sounds like they  
20 had --

21 MR. FINN: There have been five or so different  
22 products identified, I believe.

23 THE COURT: Okay then.

24 It doesn't sound to me that your business was  
25 overwhelming, so whatever it was, it doesn't seem to me to be

1 that much work, unless your client's books are just a total  
2 mess. I have seen checkbooks from people I know that have  
3 been really messed up.

4 MR. FLEMING: All right, Judge. That is fine. We  
5 will do that.

6 MR. SHONKWILER: And that is Number 5, the dollar  
7 amounts and dates?

8 MR. FLEMING: Yes, yes.

9 MR. SHONKWILER: Okay.

10 THE COURT: What else?

11 MR. FINN: Well, Judge, we --

12 THE COURT: What other shortcomings do you see?

13 MR. FINN: If we can go back to interrogatory Number  
14 1 for a moment, because they are pegging it to specific  
15 interrogatories.

16 So everyone is clear, in their initial response they  
17 have about 15 pages of lists of entities that are prior or  
18 current something, be it a customer, be it a vendor, be it a  
19 proposal.

20 Can we get dates associated with that as well?

21 MR. FLEMING: I don't see an interrogatory, your  
22 Honor, that asks us to identify when was somebody a customer  
23 and when did they become a former customer. There is no  
24 interrogatory that asks for that.

25 MR. FINN: Sure there is. There is --

1 MR. FLEMING: And I don't think that is relevant.

2 I think your Honor has honed in on the key issue here  
3 they are asking for, and we are happy to do it, even though we  
4 have already given them answers by --

5 MR. FINN: Your Honor, certainly the information they  
6 provided in the prior response, together with interrogatory  
7 Number 9, which asks for customers by year is --

8 THE COURT: Number 3 is --

9 MR. FLEMING: We will give them the customers. We  
10 have said we will give them by date, by amount, by -- describe  
11 what the products and services were, and the sales, to the  
12 customers. We have agreed to do that, Judge. I think that  
13 resolves it.

14 We seem to be going around in full circle and coming  
15 back to it. I don't think we have to give a list of who is  
16 our former customers. We will give them the dates of the  
17 sales to customers.

18 THE COURT: And who the customer was.

19 MR. FLEMING: That is self-evident. If we sold  
20 something to someone in 2001, and we haven't sold them  
21 anything since, they are probably a former customer.

22 THE COURT: But 3 and 9 require specific dates,  
23 amounts, names, and product identification.

24 MR. FLEMING: For customers, right, Judge?

25 THE COURT: Yes, all customers by years, for vendors,



1 and --

2 MR. FLEMING: Who is a vendor though? Is that our  
3 customer?

4 THE COURT: It says, For vendors of and/or suppliers  
5 for any product or service offered, sold, licensed, or  
6 distributed by each plaintiff.

7 MR. FLEMING: So then that is the customers of the  
8 plaintiffs?

9 MR. FINN: No, a vendor would be --

10 MR. FLEMING: Who we sell to?

11 THE COURT: Customers of plaintiffs, and your -- and  
12 the people for which you buy from, presumably.

13 MR. FINN: That is what we are looking for.

14 THE COURT: All of that information.

15 MR. FLEMING: Our suppliers?

16 THE COURT: Yes, that is what it asks for, if you  
17 read it carefully.

18 MR. FLEMING: Well, with all due respect, your Honor,  
19 what -- what -- what -- what does that have to do with any  
20 issue?

21 THE COURT: I don't know. I am just saying this is  
22 what it asks for.

23 MR. FLEMING: I understand, but --

24 THE COURT: And I haven't heard any objection to  
25 supplying that information.

1           If it is a trade secret or whatever, then that would  
2 be an appropriate response, but if it is asked for, I don't  
3 know, then you should --

4           MR. FLEMING: It is clearly not relevant, your Honor.

5           MR. FINN: Your Honor --

6           THE COURT: We all know relevancy is not the test, it  
7 is whether it would lead to relevant conduct, and I am not in  
8 a position because I don't know enough about the case to say  
9 that it has no relevancy.

10           Now, if you want to make a motion -- if you made a  
11 motion saying that that information is not relevant, I would  
12 certainly consider the argument, but it requests it, and I  
13 have heard no objection to it.

14           MR. FLEMING: I would like leave to file that motion,  
15 your Honor, because that is beyond the pale.

16           I mean, his focus here is to try and establish -- he  
17 wants to try and show that --

18           THE COURT: It is kind of a little late to be  
19 objecting. These have been sitting around for some time.

20           MR. FINN: Not to mention, your Honor, they have  
21 partially given us that information, again, in that list of  
22 information that I keep referring to in response to  
23 interrogatory Number 1.

24           They identified some of their vendors, and so I -- so  
25 the point with the vendors is --

1 MR. FLEMING: I -- I --

2 MR. FINN: If Mr. Fleming does not recognize the  
3 relevancy with the vendors, it should be clear. We are taking  
4 the position that they weren't really doing business under  
5 this mark, or under these marks, and if they don't have  
6 vendors supporting them, then that leads to relevant  
7 information that the business was not ongoing.

8 THE COURT: Again, there is no motion pending, and my  
9 view is that when somebody asks for information, it should be  
10 produced, unless there is a darn good reason not to.

11 If it requires 3,000 hours of work by ten people,  
12 then that is probably a pretty good reason not to. Or if it  
13 is trade secrets, that may very well be a good reason not to.  
14 But I am not aware that that is a problem in this case. It  
15 hasn't been raised to this point. And I think it is a little  
16 late to be raising it.

17 I mean, these interrogatories were filed when?

18 MR. FINN: In June they were originally served, your  
19 Honor.

20 THE COURT: Okay.

21 So that is --

22 MR. FINN: If Mr. Flemming -- if plaintiffs believe  
23 that it is overly burdensome, your Honor, we would be willing  
24 to limit that request with respect to vendors from 2005 to  
25 date.

1 THE COURT: Okay.

2 Well, you are supposed to meet and confer any way, so  
3 okay.

4 How much time do you need to respond to these? And I  
5 see you are looking at the younger members of the staff.

6 MR. SHONKWILER: Well, it depends on what we are  
7 being asked to do.

8 Number 5 will be supplemented so we will draw our  
9 conclusions from the documents we have identified as to how  
10 many dollars per month were sold by plaintiff.

11 Are there other --

12 THE COURT: And as to whom and so forth.

13 MR. SHONKWILER: Okay.

14 MR. FLEMING: I would say 28 days, your Honor.

15 MR. FINN: Just so we are clear, your Honor, they are  
16 providing a response based upon documents they identified. To  
17 the extent that they haven't identified documents, and I have  
18 said it before, I don't believe there are documents for  
19 certain years, are they saying there will not be a response?  
20 That is part of my difficulty here.

21 THE COURT: There is a request for documents, and as  
22 I understand it, you are producing documents, you have  
23 produced some, and you may have produced more today or  
24 yesterday that they haven't had a chance to review.

25 MR. FINN: But this is an interrogatory.

1           THE COURT: Document production is separate and apart  
2 from interrogatory responses, that work. So, you still have  
3 an obligation to produce the documents, but you have a  
4 separate obligation to respond to the interrogatories as  
5 written.

6           I mean, I don't think you have done that to date,  
7 and that is what I am ordering you to do, and if you want 28  
8 days then --

9           MR. FINN: You are ordering them.

10          THE COURT: Yes, yes.

11          MR. FINN: Okay.

12          THE COURT: What did I say?

13          MR. FINN: You are just looking at me and saying  
14 "you".

15          THE COURT: Yes, I am ordering them.

16          MR. FINN: Okay.

17          MR. FLEMING: 28 days is fine, Judge.

18          THE COURT: All right.

19          And I assume if there are further problems, I will  
20 hear about it in a motion.

21          MR. FINN: Very good.

22          Thank you, your Honor.

23          THE COURT: Is there anything else?

24          MR. FLEMING: Let's talk a little bit about the  
25 status of the other written discovery.

1 I think as I was telling your Honor, we have produced  
2 all of our paper discovery, we have identified approximately  
3 150,000 E-mails, and we have produced about 100,000 pages of  
4 those.

5 Google has produced about 10,000 pages of paper  
6 documents, and they have not yet started, but say they are  
7 going to start, reviewing their E-mails, electronically stored  
8 information.

9 THE COURT: Both sides have an obligation, and if  
10 there is a motion to compel --

11 MR. FLEMING: There is no motion, Judge.

12 MR. FINN: No.

13 THE COURT: Okay.

14 Then I assume that Google will perform in accordance  
15 with the rules.

16 MR. FINN: As recently as two days ago the parties  
17 were talking about what Google was doing and what are the  
18 categories plaintiffs would like us to look for, and we told  
19 them we are working towards that.

20 THE COURT: And the parties are directed, under our  
21 rules, to meet and confer if they think there is some problem  
22 with discovery, and then if the meet and confer doesn't  
23 resolve the problem, then you can bring a motion and I will be  
24 happy to hear it.

25 Okay?

1 MR. FLEMING: Does your Honor want to set a tentative  
2 date for the parties to complete the exchange of written  
3 discovery?

4 THE COURT: Well, the rules provide it, and  
5 apparently, you have agreed to extend time.

6 We didn't set any discovery cut-offs.

7 MR. FINN: Your Honor, there actually has been no  
8 Rule 16 type discovery schedule or pretrial schedule set.

9 Perhaps the Court would like us to go back and confer  
10 and come back and try to present something?

11 THE COURT: Yes, I think that is a good idea, to come  
12 up with a schedule for everything.

13 MR. FLEMING: That is fine, your Honor.

14 MR. FINN: Yes.

15 THE COURT: So, let's have a status --

16 MR. FINN: We are here --

17 THE COURT: (Continuing) -- say in five weeks. By  
18 then they will have produced everything.

19 At that time I will set a schedule, and hopefully  
20 written discovery will be out of the way by that point, and we  
21 will set a cut-off for oral discovery, and then expert.

22 THE CLERK: February 11th at 9:00.

23 MR. FINN: And that is for what?

24 THE CLERK: A status.

25 MR. FINN: A status, okay.

1           We are before you, I believe, on January 20th, your  
2 Honor, for a ruling, if that effects the status at all.

3           THE COURT: For what?

4           MR. FINN: There is a motion for a protective order,  
5 cross motions for a protective order, pending.

6           THE COURT: I am ruling on the 20th on that?

7           MR. FINN: I believe so, your Honor.

8           THE COURT: That is the one where you agree there  
9 should be one, but there is a disagreement as to --

10          MR. FINN: Yes.

11          Google is seeking an attorneys' eyes only level and  
12 plaintiffs don't believe we need to do that.

13          THE COURT: Right, right.

14          Come back for that and I will rule on that, but it is  
15 my understanding, in the interim, there was an attorneys' eyes  
16 only.

17          MR. FINN: That is correct, your Honor.

18          THE COURT: Okay.

19          MR. FLEMING: And so we are saying on the 20th then  
20 we will address discovery?

21          THE COURT: No, we won't discuss discovery then.

22          This coming 20th, right?

23          MR. FINN: That is right.

24          THE COURT: Right.

25          I am going to rule then.



1 MR. FINN: Yes.

2 MR. FLEMING: Okay.

3 THE COURT: Am I going to be here on the 20th,  
4 January 20th?

5 THE CLERK: No.

6 THE COURT: Oh, okay.

7 That is a problem then.

8 MR. FINN: Yes.

9 THE COURT: Early February then.

10 MR. FINN: Perhaps that ruling date moved to February  
11 5th might be appropriate.

12 THE COURT: On February 5th I will rule on that  
13 motion.

14 THE CLERK: That is on a Friday.

15 THE COURT: When did I say to come in then?

16 THE CLERK: We can do February 4th for the ruling on  
17 the motion for protective order. Ruling on the motion to  
18 quash is the 25th of February.

19 So, we will not have the status then on the 11th.

20 THE COURT: Of what?

21 THE CLERK: February.

22 MR. FLEMING: The 11th is bad for me. I will be out  
23 of town.

24 Is it possible to do the 4th or the 25th?

25 THE CLERK: Do you want a status or --

1 THE COURT: Yes, I was going to have a status after  
2 the paper discovery, and I gave you 28 days.

3 So, when is that up?

4 THE CLERK: The 4th of February.

5 THE COURT: We will have a status that week on  
6 discovery. Meet and confer and then we can discuss parameters  
7 for remaining discovery. Hopefully the paper will be resolved  
8 by then.

9 MR. FINN: Very good, your Honor.

10 MR. FLEMING: So, what date does that set us at?

11 THE CLERK: The 4th, February 4th, at 9:00.

12 THE COURT: And we have a ruling on Motorola, and I  
13 already set that, didn't I?

14 THE CLERK: Yes, on the 25th of February.

15 MR. FINN: Great.

16 THE COURT: Okay.

17 MR. FINN: Thank you, your Honor.

18 MR. FLEMING: Thank you.

19 MR. SHONKWILER: Thank you, your Honor.

20 THE COURT: Okay.

21 (Proceedings concluded.)

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

/s/Krista Burgeson, CSR, RMR, CRR      January 7, 2010  
Federal Official Court Reporter      Date