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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| ERICH SPECHT, et al., |) | |
| Plaintiffs, |) | |
| vs. |) | No. 09 C 2572 |
| GOOGLE, INC., et al., |) | Chicago, Illinois |
| Defendants. |) | December 3, 2009 |
| |) | 9:30 o'clock a.m. |

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

APPEARANCES:

For the Plaintiff: NOVACK & MACEY
MR. JOHN F. SHONKWILER
100 North Riverside Plaza
Chicago, Illinois 60606
312-419-6900

For the Defendant: GREENBERG TRAURIG, LLP
MR. HERBERT H. FINN
77 West Wacker Drive
Chicago, Illinois 60601
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Court Reporter: FEDERAL OFFICIAL COURT REPORTER
MS. KRISTA FLYNN BURGESON
219 South Dearborn Street
Chicago, Illinois 60604
312-435-5567

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

2 THE COURT: Good morning.

3 MR. FINN: Good morning, your Honor. Herbert Finn on
4 behalf of Google, and that is F-i-n-n.

5 MR. SHONKWILER: Your Honor, good morning. John
6 Shonkwiler on behalf of the plaintiffs.

7 Your Honor, this morning we have 2 motions before
8 you. I have a motion to dismiss and strike 6 of the 7 counts
9 of Google's counterclaim, and Google has got a motion to
10 compel that relates to interrogatory responses.

11 I would like an opportunity to respond to the motion
12 to compel, and I understand that Mr. Finn is not prepared to
13 capitulate on our motion to dismiss either, and would like an
14 opportunity to brief that.

15 THE COURT: I don't think I need a response to the
16 motion to compel. Basically what you are looking for is
17 dates.

18 MR. FINN: Pretty much, your Honor. We told you
19 early on that this case is going to be about abandonment and
20 about --

21 THE COURT: I think they are entitled to the dates
22 that they are asking for.

23 MR. SHONKWILER: Which dates, your Honor? I have the
24 motion here.

25 THE COURT: The dates of the activity involving your

1 use of the mark.

2 MR. FINN: We are looking for who they sold it to,
3 when, who they advertised it to, when, and who --

4 THE COURT: There is a lot of activity, but no dates,
5 and I think they are entitled to that so that they can make a
6 determination, I guess their defense is, which may or may not
7 be any good, but they are entitled to determine whether or not
8 it is any good.

9 MR. SHONKWILER: We are absolutely going to give that
10 information. Let me give just a little bit of background
11 about where we are.

12 The parties have only begun document discovery. We
13 are 95 to 100 percent complete on our end with paper
14 discovery, and we are just beginning electronic production,
15 which will take place on a rolling basis. There will be at
16 least 100,000 pages, maybe hundreds of thousands of pages, and
17 I would expect the same from the other side.

18 Now, they have not begun electronic discovery, and we
19 have not received a document from them. I am not complaining
20 about that. I think discovery is moving at a normal and
21 acceptable pace and both sides are at the same place.

22 The gist of this motion is that our reliance, our
23 extensive and I think appropriate reliance on Rule 33(d), is
24 inappropriate, but you simply can't determine that when the
25 parties are -- this early in the document production stage.

1 THE COURT: I think you have to -- if you are going
2 to rely on documents, you have to be specific about what
3 documents you are referring to.

4 MR. SHONKWILER: I agree.

5 And every case is different I think in that respect,
6 but certainly if the information is not clearly located in a
7 defined and organized and labeled file that is produced, I
8 think absolutely you have got to -- to some extent you have
9 got to make it as easy for the other side to identify the
10 documents where the answer lies as --

11 THE COURT: Which I don't think you have done.

12 MR. SHONKWILER: We have not, and we can do it now,
13 and supplement it every time we produce documents, I suppose,
14 but that seems to us that it is not only not what the Rule
15 requires, but unnecessarily burdensome at a time when the
16 parties are spending hundreds of hours reviewing and producing
17 documents, and are going to be for some time.

18 I think our time is better spent getting these
19 documents out, and then updating interrogatories to the extent
20 necessary to identify every document, every group of
21 documents, where we think this information is located, and I
22 would hope they would do the same, because Google has answered
23 our interrogatories in exactly the same fashion.

24 Your Honor, honestly, the only reason we didn't file
25 a cross motion was because we think both sides have proceeded

1 appropriately up to this point, and we don't want to spend our
2 time briefing these motions instead of --

3 THE COURT: That is why I am hearing you now rather
4 than having to brief it.

5 MR. SHONKWILER: And I agree, the only thing we agree
6 on is we shouldn't spend time and money briefing these.

7 But I don't agree that either side is preceding
8 inappropriately, and Google -- and if we are going to decide
9 this without briefing, we ought to have a universal order that
10 applies to both parties, because Google has answered in
11 precisely the same manner as --

12 THE COURT: I mean, I think if you ask for dates,
13 they have to give you dates, unless they say they don't know
14 the dates, but they have to say, We don't know. It is not
15 acceptable on either side, and obviously the Rules are the
16 same on both sides, that if you ask for a date, you give them
17 the dates, unless you don't know it, but then you have to say
18 you don't know.

19 MR. FINN: Your Honor, if I may.

20 We are not here in front of you for Google's
21 responses. You don't even have them in front of you, so you
22 don't have anything to review. We haven't had Rule 37 on
23 that. We will abide by whatever the orders are.

24 Now, that said, Mr. Shonkwiler indicates that he is
25 95 percent done with document production and --

1 MR. SHONKWILER: Paper production, your Honor.

2 MR. FINN: Well, I have looked through all the paper
3 production and I can't identify when these things took place.

4 This is a unique instance. We have a situation where
5 plaintiff can produce documents from ten years ago, but they
6 can't produce documents from two years ago. And they are
7 saying, Take a look at the documents. There are no invoices.
8 There are no advertisements. There are no indications of any
9 dates, any activity, occurring in 2005, 2006, 2007, 2008.

10 And the telltale that the documents are missing, if I
11 can direct the Court's attention to Exhibit 7 of our motion,
12 is --

13 THE COURT: What is it? What is 7?

14 MR. FINN: That is the supplemental interrogatory
15 responses, your Honor.

16 THE COURT: Okay.

17 What page of that?

18 MR. FINN: Page 7 of that.

19 We ask for plaintiffs to identify by year the total
20 dollar amount of goods and services sold. When you get past
21 the objections there it says, Notwithstanding the foregoing,
22 they go on and say that they have sold, licensed, and/or
23 distributed products, at least in the following way:

24 Certain clients received discounted or free services
25 based upon an ongoing personal or business relationship with

1 plaintiffs, and therefore, no invoices were generated;

2 Certain clients were not billed for services where it
3 appeared that they could not afford to pay, and therefore, no
4 invoices were generated;

5 And consultations with certain clients were often not
6 billed in hope of receiving future business and no time sheets
7 or other records of these consultations were kept.

8 So, we are being told it is going to be in the
9 documents, but if you look at the response, they are saying,
10 there are no documents.

11 MR. SHONKWILER: This is not -- now this is not -- it
12 is no longer a discovery motion, he is arguing the merits of
13 his case, he is arguing whether we have the support for it,
14 and that is wrong for two reasons:

15 Number 1, that is not at all what this motion is
16 about or what discovery is about;

17 Number 2, as I just said, the electronic production
18 on neither side has produced a single page of electronic
19 documents, and the current information, I would think, is
20 likely to be in the electronic documents, and I expect the
21 productions to be voluminous on both sides as it is in any
22 commercial case these days.

23 And this idea that we don't have evidence, fantastic,
24 but again, we are arguing the merits of the case there.

25 And one more thing that will come out over and over

1 again in this case, your Honor, we are talking about software
2 sales. Software is not sold like widgets. Software is
3 distributed, and often for free.

4 Google does the same thing. Google is distributing
5 its software for an administrative fee, which is a nominal, I
6 think, \$15 or \$20 or \$25 fee.

7 THE COURT: What you are saying in that answer is
8 that you have no -- there is no paper trail and no electronic
9 trail of any of these activities?

10 MR. SHONKWILER: What we are saying is there is a
11 trail, and that there are invoices, and that the sales --

12 THE COURT: But this says there are not any.

13 MR. SHONKWILER: For some transactions there are not,
14 and this objection is something we want to get out, so we
15 don't face this argument that based on the document
16 production, this shows there are no sales. That is not true.
17 That begs the question what is a sale, and as Google will
18 admit to you when it is ripe in our own motion, is that -

19 THE COURT: All they are entitled to -- and you can
20 make any argument you want, presumably you can sell lots of
21 goods without any paper trail, electronic or paper, at all,
22 and that is not normally the way business is done, but you can
23 give things away, normally there is some kind of a trail so
24 that -- but, you know, that is an acceptable answer, that
25 there isn't anything.

1 Then they can argue summary judgment, or at trial
2 that that is not normally the way it is done, but they are
3 entitled to be certain -- but they are entitled to know who
4 you gave the stuff to.

5 MR. FINN: That is all we are looking for, your
6 Honor.

7 Who and when.

8 THE COURT: So then they can --

9 MR. FINN: Just who and when.

10 MR. SHONKWILER: Your Honor, we did.

11 Our interrogatory answers originally were I think 40
12 pages long and identified a long list of potential -- of
13 future and current customers.

14 THE COURT: But no dates.

15 MR. SHONKWILER: Dates of what?

16 THE COURT: When you gave the stuff to them or when
17 you transferred it without pay.

18 I mean, that is --

19 MR. SHONKWILER: All right.

20 Well, you know what, I suppose we --

21 THE COURT: They are entitled to know, and if you
22 don't know the dates, just say, I have no idea when that was
23 done.

24 MR. SHONKWILER: With respect to that particular
25 interrogatory that asks for sale dates, I don't think it is

1 appropriate in an interrogatory to ask the other side to
2 respond in writing by listing the date of every sale.

3 We have asked Google the same question and they have
4 responded in the same manner. They have said, We will produce
5 documents pursuant to Rule 33(d).

6 THE COURT: But if you say you have no documents,
7 then you have to give -- the only way they can find out then
8 is if you tell them in an answer to in interrogatory. They
9 are entitled to that.

10 MR. SHONKWILER: With that part, that is fine.

11 THE COURT: With no electronic or paper evidence, if
12 there is none, then you have to tell them when the actual gift
13 or the transfer took place, what the date was, and to who it
14 was.

15 MR. SHONKWILER: I don't have any problem with that
16 at all, whether it is done in an interrogatory or in a
17 deposition.

18 To the extent that the documents don't answer the
19 question, that needs to be answered, but I don't think it is
20 appropriate that we do it when neither side appears to me to
21 be even a third of the way to producing all the documents,
22 because it will just lead to more supplementing and more
23 supplementing until we get to the end and say --

24 I mean, your Honor, we haven't reviewed every page of
25 electronic material that we are going to be producing. We

1 have 3 associates working on it full time, but it is a big,
2 big job.

3 MR. FINN: Your Honor, these interrogatories were
4 served back in June, along with document requests, when this
5 Court permitted us to advance the issue of abandonment.

6 Now we are being told, after plaintiffs look for a
7 TRO, look for a preliminary injunction -- and usually
8 plaintiff is the one who wants to get things going. I think
9 that is very telling here, but now we are being told we have
10 to wait for them to do their own due diligence to figure out
11 when they sold product, when they advertised product, because
12 this individual who sets up 2 corporations has so many
13 electronic files that relate just to this matter that it is
14 taking 3 associates full days to review them, that that is how
15 much material there is.

16 Now, there may be that much material, but we have
17 been asking for it since June.

18 THE COURT: When can you get it to him?

19 MR. SHONKWILER: We are moving -- we are ahead of
20 Google in terms of how many pages we produce, and we intend to
21 remain with or ahead of Google, and we --

22 THE COURT: The question is not how many you produced
23 but when are you going to complete it.

24 MR. SHONKWILER: We can set some reasonable
25 deadlines, that is fine. We don't have any.

1 THE COURT: Reasonable deadlines are the ones
2 specified by the Rule, which I think says 30 days, whatever it
3 is, but under certain circumstances, obviously some cases take
4 longer than that.

5 So, when can you comply with your discovery
6 obligations as presented in this motion?

7 MR. SHONKWILER: Like I said, I will put the question
8 to Mr. Finn first, when he intends to have his electronic
9 production completed.

10 We have deposed one of Android's --

11 THE COURT: Wait, wait, wait.

12 This is his motion. You don't have a motion.

13 MR. SHONKWILER: Well, the reason we didn't file one
14 is we don't think it is warranted.

15 THE COURT: You need to sit down with him and go
16 through the requirement of conferring with --

17 MR. FINN: Rule 37 --

18 THE COURT: If they are late, if they are incomplete,
19 I will certainly order them, and Mr. Finn, you can take this
20 too, that the Rules apply both ways.

21 MR. FINN: Understood, your Honor.

22 THE COURT: But I only issue orders when there is a
23 document in front of me, and there is a document in front of
24 me, and so I am prepared to order you to comply, but I will
25 give you -- if you can tell me a reasonable period of time

1 when you can complete and give them the answers, the dates,
2 and so forth, and to whom these free gifts went, or transfers,
3 that is fine.

4 MR. SHONKWILER: With respect to the interrogatory
5 that asks for dates of sales, we will supplement the
6 interrogatory answer to the extent that the documents -- to
7 the extent that we don't think the documents are going to
8 answer the question.

9 I mean, we will do our best to --

10 THE COURT: Either that or specify the documents,
11 like say, Bates stamped such and such you will find at --

12 MR. SHONKWILER: That is the complicated part. We
13 haven't produced all the documents yet.

14 We will gladly supplement now based on --

15 THE COURT: You know, the stuff you haven't gotten --
16 I mean, if you don't have a document, all you have to do is
17 say, I don't have any documents, but you are obligated to give
18 dates and names if you have -- if you can refer to documents,
19 then you can refer to them in a specific enough way so that
20 they can find them easily, which will answer the questions, or
21 you have to spell it out in the Answers to Interrogatories,
22 and if you don't know the information, obviously you just say,
23 I don't know.

24 MR. SHONKWILER: All right.

25 THE COURT: You can say, I have no way -- we have no

1 way of finding out. You can say, After a diligent search, we
2 cannot answer the question any more specifically, something
3 along those lines, so that they can rely upon the fact that
4 you are not going to at a later date pop up with something
5 then.

6 MR. SHONKWILER: Well, at a later date I expect we
7 will, and that is my principal objection.

8 THE COURT: Then you have to come in seasonably and
9 explain why you found a document at a later point.

10 MR. SHONKWILER: Well, I guess, with all due respect,
11 we are moving as fast as we can with document production, we
12 are ahead of Google, Google has a long way to go, and --

13 THE COURT: That again is irrelevant for purposes of
14 this motion.

15 MR. SHONKWILER: Again, with all respect, I think
16 what is relevant is --

17 THE COURT: What is relevant is when you can tell me
18 and tell Mr. Finn when you can complete your discovery as
19 requested in the interrogatories.

20 Do you want a date in 30 days?

21 MR. SHONKWILER: I suggest two things:

22 Number 1, that we can -- subject to our reservation
23 of our right to -- whatever right we have to supplement after
24 we have completed reviewing the documents and producing them,
25 which we haven't done yet, we will supplement the

1 interrogatory answer that relates to -- that asks for dates of
2 sales, and in particular, the one that we have said -- for
3 which we have said there are sales that are not documented, to
4 our knowledge. We will supplement those with information that
5 we do have that is not documented, and then --

6 THE COURT: When are you going to do that?

7 MR. SHONKWILER: We can do that before the holidays.
8 We can do that within 21 days.

9 THE COURT: All right.

10 MR. SHONKWILER: And then I guess what Mr. Fin and I
11 need to confer about is when we are going to be complete with
12 our document productions.

13 THE COURT: You are certainly free to do that and I
14 encourage that, obviously.

15 Why don't we do this:

16 You will supplement your answers within 21 days, I
17 will continue the motion over until after the 1st of the year,
18 and we will see how the compliance is.

19 So, 21 days to file your supplement, and continue the
20 motion, Wanda, until, sometime in January.

21 THE CLERK: January 7th the motion is continued to at
22 9:00.

23 21 days falls on the 24th.

24 THE COURT: All right.

25 And if you are dissatisfied with Google's, you are

1 certainly free, after conferring, to file any motion you
2 wish.

3 MR. SHONKWILER: I expect that is where we will be
4 on the 7th. We will have twice as much fun as we had today.

5 THE COURT: Now, there is a motion to dismiss the
6 counterclaims, and I assume, Mr. Finn, you wish to respond to
7 them?

8 MR. FINN: Yes, we do, your Honor.

9 THE COURT: How much time do you need?

10 MR. FINN: Well, your Honor, I think --

11 THE COURT: Is this totally dispositive or just some
12 of the counterclaims?

13 MR. SHONKWILER: 6 out of 7 claims.

14 MR. FINN: It is not totally.

15 THE COURT: So there is no urgency?

16 MR. FINN: I don't believe there is.

17 THE COURT: Okay.

18 So, basically it -- obviously, I will not get to it
19 after the 1st of the year, and so you can have 30 days, I
20 guess.

21 MR. FINN: That will be great, your Honor.

22 THE COURT: And then 7 days to reply.

23 MR. SHONKWILER: I would rather have 21 days, but I
24 could do it in 14. It is a lot of -- with 6 claims, and each
25 of them asserting --

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THE COURT: 30 days to respond. 14 days to reply.

THE CLERK: January 4th and January 19th.

MR. FINN: Thank you, your Honor.

THE COURT: And set it for ruling in February
sometime.

THE CLERK: February 17th at 9:00.

MR. FINN: Thank you, your Honor.

MR. SHONKWILER: Thank you, your Honor.

(Proceedings concluded.)

C E R T I F I C A T E

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
Federal Official Court Reporter

December 3, 2009
Date