

P. ANDREW FLEMING
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December 17, 2009

VIA EMAIL & U.S. MAIL

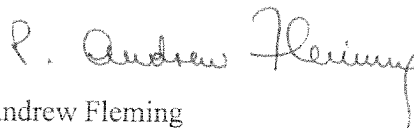
Jonathan M. Cyrluk
Stetler & Duffy Ltd.
11 South LaSalle Street
Suite 1200
Chicago, IL 60603

Re: Specht, et al. v. Google Inc.
Case No. 09 CV 2572

Dear Mr. Cyrluk:

Enclosed please find a draft Tolling Agreement between Plaintiffs and your clients related to the above-captioned matter. We look forward to discussing the draft with you at your earliest convenience.

Yours sincerely,



P. Andrew Fleming

PAF:imp
Enclosure

326745-1

DRAFT

TOLLING AGREEMENT

This Tolling Agreement is made effective this ____ day of December 2009, between, on the one hand, Erich Specht, an individual, and doing business as the Android Data Corporation, and The Android's Dungeon Incorporated (the "Plaintiffs"), Plaintiffs in the litigation captioned Specht et al. v. Google, Inc., Case No. 09 CV 2572 pending in the United States District Court for the Northern District of Illinois (the "Litigation") and, on the other hand, Motorola, Inc. and NVidia Corporation, which are former defendants in the Litigation (the "Former Defendants"). (Collectively, Plaintiffs and the Former Defendants shall be referred to herein as the "Parties").

RECITALS

WHEREAS, on or about April 28, 2009, Plaintiffs filed their Complaint for Trademark Infringement (the "Complaint") in the Litigation against, among others, the Former Defendants.

WHEREAS, the Complaint alleged, among other things, that: (a) Plaintiffs have a registered trademark for ANDROID DATA; (b) ANDROID DATA has been used in connection with Plaintiffs' goods and/or services since at least 1999; (c) Plaintiffs' goods and/or services are described as, without limitation, "computer e-commerce software to allow users to perform electronic business transactions via a global computer network;" (d) Google, Inc. created an operating platform for mobile devices it calls the "Android Platform"; (e) the Former Defendants, among others, produce, manufacture and/or market products and/or services that bear, utilize or are connected with the Android Platform; and (f) Google's, the Former Defendants' and others' use of the Android Platform is confusingly similar to Plaintiffs' ANDROID DATA mark.

WHEREAS, based on the foregoing allegations, Plaintiffs brought claims against the Former Defendants, among others, for, among other things: (1) trademark infringement under 15

U.S.C. § 1114; (2) unfair competition in violation of 15 U.S.C. § 1125(a); (3) deceptive trade practices in violation of 815 ILCS 510/2; and (4) common law trademark infringement (collectively, the "Claims").

WHEREAS, on August 4, 2009, the court dismissed the Former Defendants, among others, from the Litigation without prejudice.

WHEREAS, Plaintiffs have or may have reason to refile the Claims against the Former Defendants.

WHEREAS, Plaintiffs have or may have reason to file different claims against the Former Defendants based on their production, manufacture and/or marketing of products and/or services that bear, utilize or are connected with the Android Platform, whether known or unknown, and whether such claims can be asserted in the Litigation or in a separate case (the "New Claims"). (The Claims and New Claims are referred to collectively as the "Tolled Claims.")

WHEREAS, the Former Defendants have or may have certain defenses and/or arguments for avoidance of liability against the Tolled Claims, whether known or unknown, and whether such defenses or arguments can be asserted in the form of a defense, affirmative defense, or otherwise. (These defenses and arguments for avoidance of liability are referred to as the "Tolled Defenses.")

WHEREAS, the Parties desire that Plaintiffs forbear from asserting the Tolled Claims against the Former Defendants and that the Former Defendants forbear from asserting the Tolled Defenses against Plaintiffs, and that the running of any applicable statutes of limitations or comparable defenses or arguments that may pertain to any of the Tolled Claims and/or the Tolled Defenses be suspended.

TERMS

Now, therefore, in consideration of the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Incorporation of Recitals.** The recitals and prefatory phrases and paragraphs set forth above are incorporated in full into this Tolling Agreement.

2. **Tolling of Claims and Defenses.** In connection with all Tolloed Claims and Tolloed Defenses, the time periods relating to any claims, defenses, or arguments for assessment or avoidance of liability based upon the passage of time, including but not limited to statutes of limitations, statutes of repose, estoppel, and laches, are hereby suspended and tolled. The suspension and tolling of all such time periods shall continue up to and including the thirtieth day after termination of this Tolling Agreement in accordance with paragraph 6 of this Tolling Agreement.

3. **Waiver of Time-Based Defenses.** The Parties waive all Tolling Defenses and all arguments for avoidance of liability relating to the passage of time, estoppel, laches, or other delay insofar as such defenses or arguments relate to the passage of time from the effective date of this Tolling Agreement up to and including the thirtieth day after termination of this Tolling Agreement in accordance with paragraph 6 of this Tolling Agreement.

4. **Filing of Claims in Separate Lawsuit.** The Parties agree that, upon termination of this Tolling Agreement in accordance with paragraph 6 of this Tolling Agreement, Tolloed Claims may be filed in the Litigation or in a separate lawsuit, notwithstanding any state or federal statute, rule, or other law to the contrary and Tolloed Defenses may be asserted in response thereto.

5. **Prior Dismissal.** The dismissal of the Claims against the Former Defendants in the Litigation shall not be treated as the prior dismissal of an action containing the same claim or any similar claim as any Tolloed Claim for purposes of Federal Rule of Civil Procedure 41(d), or other state or federal statute, rule, or other law.

6. **Termination.** This Tolling Agreement shall terminate on the earlier of: (a) 30 days after a Party gives written notice of an intent to terminate served on the other Party as described in paragraph 9 of this Tolling Agreement, unless such notice of intent is subsequently withdrawn; or (b) six months after the date on which the judgment fully and finally terminating the Litigation becomes final by conclusion of direct review or the expiration of the time for seeking such review.

7. **Stand Still.** No Party shall file against any other Party any lawsuit, claim, counterclaim, cross-claim or third-party claim based in whole or in part on the Tolloed Claims or Tolloed Defenses during the period in which the tolling and suspension of Tolloed Claims continues in accordance with paragraph 2 of this Tolling Agreement.

8. **Reservation of Other Claims and Defenses.** Except as expressly provided herein, this Tolling Agreement shall not toll, suspend or otherwise affect any claim or defense other than the Tolloed Claims and Tolloed Defenses. The Parties reserve all such claims and any defenses relating to them.

9. **Notice.** Notice under this Tolling Agreement shall be sent by: (a) facsimile and/or e-mail; and (b) overnight delivery by a nationally recognized overnight delivery service such as FedEx, UPS or DHL to:

Notice to Plaintiffs:

P. Andrew Fleming
Novack and Macey LLP
100 North Riverside Plaza
Chicago, IL 60606
andrewf@novackmacey.com

Notice to Former Defendants:

Jonathan M. Cyrluk
Stetler & Duffy Ltd
11 South LaSalle Street
Suite 1200
Chicago, IL 60603

Notice shall be deemed effective on the first day that is not a Saturday, Sunday or Legal Holiday (as that term is defined in Federal Rule of Civil Procedure 6(a)(6)) after Notice is e-mailed and/or faxed and placed with an overnight delivery service.

10. **No Admission.** This Tolling Agreement shall not operate or be construed as an admission or acknowledgment of any liability of any Party or any other person or entity to any other Party, person or entity, or of the absence of any obligation or liability, or the existence of any claim or defense.

11. **Successors and Assigns.** This Tolling Agreement is binding upon and inures to the benefit of the Parties, their successors, assigns, holding companies, and affiliates.

12. **Governing Law.** The interpretation and enforcement of this Tolling Agreement shall be governed by the laws of the State of Illinois without regard to any statute, rule or other law concerning choice of law. This choice of law provision applies only to the interpretation and enforcement of this Tolling Agreement and does not apply to any other tolling agreement or any other contractual or other dispute between the Parties. The Parties also expressly reserve the

right to contest or dispute the law governing their underlying substantive rights as to the Tolleed Claims and Tolleed Defenses.

13. **Venue and Jurisdiction.** Any lawsuit filed relating to the enforcement of this Tolling Agreement shall be filed in the Circuit Court of Cook County in Chicago, Illinois. The Parties waive any and all objections and/or defenses relating to venue and/or personal jurisdiction in any enforcement action filed in that court.

14. **Counterparts and Delivery of Tolling Agreement.** This Tolling Agreement may be executed by the Parties on separate counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one and the same instrument. The Parties may execute this Agreement and transmit such executed Agreements by facsimile or e-mail and such transmissions shall be deemed originals.

15. **Merger and Modification.** This Tolling Agreement sets forth and constitutes the entire agreement between the Parties with respect to its subject matter and supersedes any and all prior agreements, understandings, promises, warranties, and representations made by each to the other concerning its subject matter. This Tolling Agreement may be modified only by a written document signed by the Parties. No waiver of this Tolling Agreement or of any of the promises, obligations, terms, or conditions in this Tolling Agreement is valid unless it is written and signed by the Party against whom the waiver is to be enforced.

16. **Captions.** The captions of this Tolling Agreement have been inserted solely for reference purposes and shall not be given any effect in the construction or interpretation on this Tolling Agreement.

17. **Interpretation of Tolling Agreement.** The Parties acknowledge and agree that this Tolling Agreement is the product of draftsmanship by all sides. Therefore, in the event of

any dispute concerning the interpretation of this Tolling Agreement or its terms, any ambiguities that may be found in this Tolling Agreement shall be interpreted according to the fair and reasonable meaning of the language used considering the stated intentions of the Parties. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Tolling Agreement.

18. **Warranty Regarding Assignment.** The Parties hereby warrant and represent that they have not previously assigned or in any way transferred or conveyed all or any portion of the Tolleed Claims or Tolleed Defenses. The Parties acknowledge and agree that this warranty and representation is an essential and material term of this Tolling Agreement, without which they would not have entered into this Tolling Agreement.

19. **Warranties.** The undersigned persons warrant themselves: (a) to be of lawful age; (b) to be legally competent to execute this Tolling Agreement; (c) to be fully authorized to execute this Tolling Agreement on behalf of the Party indicated below; (d) to have signed this Tolling Agreement on behalf of the Party indicated as their own free acts and deeds after relying upon the legal advice of their respective attorneys and/or other agents; and (e) that the terms of this Tolling Agreement have been completely read and explained by their respective attorneys and/or other agents, and these terms are fully understood and voluntarily accepted by each of them on behalf of the indicated principal.

SIGNATURE PAGE FOLLOWS

IN WITNESS HEREOF, the following duly authorized representatives of Plaintiffs and the Former Defendants cause this Tolling Agreement to be made effective as of the Effective Date indicated above:

Erich Specht, individually and doing business as Android Data Corporation

Motorola, Inc.

By: _____

By: _____

Its: _____

The Android's Dungeon, Incorporated

NVidia Corporation

By: _____

By: _____

Its: _____

Its: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ERICH SPECHT, et al.,)	
)	
Plaintiffs,)	Case No.: 09-cv-2572
)	
v.)	Hon. Harry D. Leinenweber
)	
GOOGLE INC.,)	Magistrate Judge Cole
)	
Defendant.)	

DECLARATION OF EDWARD G. THARP

I, Edward G. Tharp, being competent to testify to the matters set forth below pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the Finance Director for Motorola's Mobile Devices North America Go to Market Team. I am responsible for financial reporting relating to the sale of Motorola cellular phones, including the Droid, within the North American region.

2. I make this declaration in support of Motorola's Motion to Quash the Non-Party Subpoena.

3. On November 19, 2009, Plaintiffs in this matter served a non-party subpoena *duces tecum* (the "Subpoena") on Motorola seeking the production of eighteen (18) categories of documents. The categories of documents Plaintiffs seek from Motorola include confidential financial and product information. Specifically, the Subpoena requests Motorola to produce documents that would identify all actual and projected gross revenues and profits, as well as all actual and projected net income and/or net profits, for Motorola concerning any and all mobile

phones, mobile devices, products and services that bear or are associated with the Android Mark and/or the Droid Mark. (Exhibit 1, Request Nos. 8, 9 and 10). The Subpoena also requests documents that would identify all projected and actual expenses for Motorola concerning any and all mobile phones, mobile devices, products and services that bear or are associated with the Android Mark and/or the Droid Mark (Id., Request No. 11) (hereinafter referred to as the "Financial Information"). Plaintiffs have made clear they are seeking Financial Information relating specifically to the Droid phone. Plaintiffs have also sought documents identifying payments made by Motorola to Lucasfilm concerning the Droid Mark and/or products and services related thereto (Id., Request No. 7); documents concerning Motorola's contribution to the development of the Android OS and/or Android Platform (Id., Requests Nos. 16 and 17).

4. The Financial Information sought in the Subpoena is highly confidential and trade secret information. The Financial Information is marked and treated under Motorola's iProtect Policy as "Motorola Confidential Restricted Information." Pursuant to Motorola's iProtect Policy, that is information that:

[I]f disclosed, compromised or destroyed, would directly or indirectly have a significant adverse impact on Motorola, its customers or employees. Motorola Confidential Restricted Information is "data of concern" and has high confidentiality or integrity requirements. Characteristics of Motorola Confidential Restricted Information are: Unauthorized disclosure of the information would expose Motorola to significant financial loss or embarrassment, or jeopardize the protection of Motorola's assets.


5. As a condition of employment, Motorola employees must adhere to the iProtect Policy for the marking and treatment of confidential information. Employees are required to take training regarding the policy every two years.

6. The type of Financial Information sought in the Subpoena as it relates to specific phone models (e.g.the Motorola Droid phone) is never disclosed or reported to any third party and is circulated within Motorola on a limited or need-to-know basis. Motorola will be harmed because any disclosure of Motorola's pricing and cost structure on a per phone model basis would give Motorola's customers, distributors and competitors a competitive advantage by allowing them to undercut Motorola's prices, affect its profitability and take away market share. That concern is even greater here where Google, as a result of the sale and marketing of the Nexus One phone, is a direct competitor of Motorola as the Google phone competes directly with the Motorola Droid.

7. Additionally, Motorola manufactures phones on behalf of other entities and has disclosed that it will manufacture a phone for Google. Disclosure of Motorola's pricing and cost structure, as well as its profit margins, would potentially harm Motorola in its price negotiations related to the Google project.

I declare under penalty of perjury the foregoing is true and correct.

Dated: February 8, 2010
Executed in Libertyville, Illinois


Edward G. Tharp

