

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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ERICH SPECHT, et al.,

Plaintiffs,

vs.

GOOGLE, INC., et al.,

Defendants.

No. 09 C 2572

Chicago, Illinois
September 30, 2010
9:30 o'clock a.m.

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

APPEARANCES:

For the Plaintiffs:

NOVACK & MACEY
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For the Defendant,
Google, Inc.:

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Court Reporter:

FEDERAL OFFICIAL COURT REPORTER
MS. KRISTA FLYNN BURGESSON
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1 THE CLERK: 09 C 2572, Specht versus Google.

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

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

6 Your Honor, the subject of this motion that we
7 received in the evening a couple nights ago is a late document
8 production, the most recent one we made, that is virtually all
9 production concerning Google and not Mr. Specht. There are
10 certainly Internet printouts about Google's business, its use
11 of the marks, its profits from the use of the marks, its
12 partners' uses of the marks.

13 There is some production about my client's ongoing
14 business activities after the suit was filed. Those ongoing
15 business activities are continuing to generate relevant
16 materials today, and they will tomorrow, just like Google's
17 ongoing activities will. We will need to have a supplemental
18 discovery exchange at some point post-summary judgment and
19 pre-trial if we get there.

20 If there is anything in the most recent production
21 that we intend to rely on for summary judgment that we end up
22 actually relying on, that Google feels it did not see before,
23 we have indicated, and we continue to be willing, to put up
24 Mr. Specht for a deposition next week.

25 If there isn't, this is moot. If there is, by all

1 means, we will --

2 THE COURT: When is your answer due?

3 MR. SHONKWILER: I'm sorry?

4 THE COURT: When is your answer due? Are the briefs
5 in?

6 MR. SHONKWILER: Tuesday.

7 I would suggest that we enter and continue this for a
8 couple weeks, we will file our summary judgment, and then if
9 there is anything --

10 THE COURT: Do you know whether or not you are
11 relying on this information?

12 MR. SHONKWILER: If there is anything, it will be
13 very, very little, and what I expect it to be, if anything,
14 your Honor, is electronic copies that were produced, native
15 electronic files that were produced that were copies of hard
16 copy materials that were produced long ago.

17 It is not new information unless there is a dispute
18 as to the authenticity of a document and if the electronic
19 information shows that, in fact, a document was created when
20 we say it was, and if it is relevant to the Court to an issue
21 that the Court considers material for summary judgment, then
22 the Court can take that under consideration, I suppose, with
23 the motion, and Google will have ample opportunity to take
24 whatever discovery it wants. And this will be a very small
25 amount, if anything.

1 Honestly, I can't say there will be anything. I can
2 tell you there won't be anything, but if Sunday night when we
3 are working on this we change our minds, I don't want to come
4 in on Monday and say, Okay, there is this small piece. But it
5 won't be anything material.

6 MR. FINN: Your Honor, we have heard a lot of
7 information just now, more than we have heard previously. We
8 have asked for clarification as to the information that was
9 produced to us long ago, as well as recently.

10 What we are hearing now is that if they do rely on
11 anything, it is electronic files of documents that were
12 previously produced. Those electronic files were in their
13 possession, at the time that they produced the paper, and
14 should have been produced then, or at least should have been
15 produced before Mr. Specht's deposition so we could have
16 addressed them, or addressed whatever the issue is with third
17 parties, because presumably, this would deal with use, so that
18 Mr. Specht took the paper materials, handed them out, sent
19 them out, mailed them, distributed them, displayed them,
20 whatever he did with whatever the materials are to third
21 parties to constitute use. We have been robbed of that
22 opportunity.

23 Plaintiffs came in shortly before Mr. Specht's
24 deposition wanting to blow up the discovery schedule, seeking
25 extensions, seeking to postpone Mr. Specht's deposition. This

1 Court said no. By late production they are getting the
2 de facto extension they want.

3 MR. SHONKWILER: There are good reasons for
4 everything we have done, your Honor. We don't want to delay
5 this case. We want the summary judgment briefed, decided, and
6 then get on with things. We are not surprising anyone with
7 anything, and this may all be moot.

8 Your Honor, we haven't decided if we will use
9 anything, and if we do, as I said, it will be tiny, and the
10 easy remedy is a short supplemental deposition, not the
11 exclusion of what could be important information to your
12 Honor.

13 MR. FINN: Your Honor, this motion has been pending
14 for almost 6 weeks. It is now 4 days before the response is
15 due and they still can't tell you whether or not they are
16 going to rely on this material information.

17 MR. SHONKWILER: Let me say that we --

18 THE COURT: Why don't I just exclude the information
19 from your response and then we can argue about it later if you
20 get by the summary judgment as to whether or not there would
21 be a reason to open discovery?

22 MR. FINN: Your Honor, just so we are clear, our
23 motion is only seeking exclusion for purposes of summary
24 judgment. We understand discovery may take place afterwards
25 then.

1 THE COURT: Yes, yes.

2 MR. SHONKWILER: Your Honor, we cannot have this
3 decided without an opportunity to read the cases they have
4 cited, to do our own research, and to tell your Honor what
5 really has happened here.

6 THE COURT: You can --

7 MR. SHONKWILER: We have not had that opportunity,
8 your Honor.

9 THE COURT: Here is what you can do:

10 Write your brief without it, and then add a
11 supplement. If you feel you have to use additional
12 information, add a supplement, and then we can hassle that
13 out and they can reply to why I shouldn't accept it. You can
14 explain why in your supplement, why this information wasn't
15 produced or wasn't -- for whatever reason, inadvertence, or
16 whether you did in another form, or whatever. I don't care
17 how you do it. But make that as a severable part of your
18 brief.

19 MR. SHONKWILER: Well, we would --

20 THE COURT: And then Google can respond both to your
21 motion and why it shouldn't be considered or why they are
22 withdrawing their objection to it.

23 MR. SHONKWILER: I think the easiest way for us to do
24 this, and I think what you just explained, is to file
25 something, file a document that -- we would file it before

1 Google files their reply, or at least in time, in the same
2 schedule, so that your Honor has full briefing of everything
3 at the same time, and that would -- and the briefing would
4 explain, A, why we should be allowed to use anything we have
5 decided to use, and B, it would identify exactly which
6 exhibits and which facts we --

7 THE COURT: No, I am saying do that now.

8 If you are going to use some of it -- I mean, it may
9 be moot, then you don't have to do it, but if you are going to
10 rely upon these late produced documents, make that a severable
11 portion of your brief and explain in your brief why I should
12 consider it, then they can respond to it, and then I will
13 rule. Either I will accept it saying, Yes, you made a good
14 point, that is acceptable and you should be able to use it, or
15 I will say, You can't.

16 MR. SHONKWILER: Your Honor, we don't disagree
17 anything was late produced and we haven't had an opportunity
18 to brief the motion saying it was late produced.

19 I was trying to suggest an alternative that allows us
20 to perhaps solve this before it ever becomes a moot issue over
21 the next two weeks and, at worst, submit a brief to your Honor
22 that identifies everything being used and explains why we
23 ought to be able to be allowed to use it.

24 THE COURT: That is essentially what I am saying, but
25 just make sure it is highlighted, or whatever, so I know that

1 this was material that was not produced prior, and explain why
2 it wasn't produced so that they can respond, just so we can --
3 I want you to highlight it so I don't have to go through it
4 line by line and figure it out, this sentence includes this,
5 and this one doesn't, blah, blah, blah. That is why I want it
6 easily severable.

7 MR. SHONKWILER: I think that is fine but --

8 THE COURT: You can explain why you are using the
9 material. And if you are not using any, then it becomes
10 academic and moot.

11 MR. SHONKWILER: I am happy to do that. I think that
12 is fine. But we cannot submit that -- I am up to my ears
13 preparing the biggest summary judgment project -- or as big as
14 any summary judgment project I have ever been involved with.
15 It is due next Tuesday and I will be up all night over both
16 weekends with a team of 6 attorneys and 2 paralegals, and I
17 will not be able to file another brief on top of it by
18 Tuesday.

19 If we could submit the supplemental filing that
20 identifies every document and explains why we ought to be able
21 to use it in 2 weeks or 3 weeks, or if we could have another 2
22 weeks to file everything, either way, I am fine with it.

23 I think the solution is right, but I don't think I
24 will be able to give it to you by Tuesday. I am certain I
25 can't.

1 THE COURT: For more time, you will have to file a
2 motion for that and ask.

3 I think this is the best time to do it, and it
4 eliminates the need to separately brief this motion, which
5 would delay everything, and as everybody says, they want to
6 get this thing resolved sooner rather than later.

7 The brief has been on file for 6 weeks. You can file
8 your brief and just -- if you are going to use this
9 information, indicate where you are using it, and why it
10 wasn't produced, or if it was -- if you contend it was
11 produced, explain where it was produced so they can respond to
12 it, and I can either -- when I am reading the brief, I can
13 say, That is a good reason why they should be able to use it,
14 and I will use that in determining whether or not to grant the
15 summary judgment or not, or I can say, I don't think it is a
16 good reason.

17 MR. SHONKWILER: I think I understand what your Honor
18 wants. What we file on Tuesday, we certainly will identify
19 everything that is in there that is produced recently.

20 THE COURT: And explain why it was not produced
21 earlier.

22 MR. SHONKWILER: But your Honor, if we can have an
23 extra week just to explain why, to submit the supplemental
24 brief to explain why, that would be a big help to us.

25 And then I am making an oral motion for us to do

1 that.

2 THE COURT: I will give you to the end of the week.
3 How is that? It was due Tuesday and I will give you to
4 Friday.

5 How much time did you have for your reply?

6 MR. FINN: The current briefing schedule should be
7 sufficient.

8 THE COURT: Thank you.

9 So, I will give you to Friday.

10 MR. SHONKWILER: Thank you, your Honor.

11 MR. FINN: Thank you.

12 (Proceedings concluded.)

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16 C E R T I F I C A T E

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

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21 /s/Krista Burgeson, CSR, RMR, CRR September 30, 2010
22 Federal Official Court Reporter Date

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