

EXHIBIT D

1 (Proceedings had in open court:)

2 THE CLERK: 09 C 2572, Specht v. Google.

3 MR. MACEY: Good morning, your Honor. Eric Macey with
4 Novack & Macey on behalf of the firm and my partner, Andrew
5 Fleming.

6 MR. FINN: Good morning, your Honor. Herbert Finn and
7 Jeffrey Dunning on behalf of Google.

8 MR. MURPHY: Good morning, your Honor. Martin Murphy
9 on behalf of myself and plaintiff.

10 THE COURT: Okay. There's Google's motion for
11 attorneys' fees and sanctions, plaintiffs' motion to strike the
12 motion for attorneys' fees and strike the motion for sanctions.

13 Is that a response or do you wish -- I don't know how
14 we want to do this. I want to work on it once --

15 MR. FINN: As do we, your Honor --

16 THE COURT: -- so I need all the information, so if you
17 want to file something in lieu of the fact if I don't strike
18 it --

19 MR. MURPHY: Your Honor, first of all, the first
20 problem, of course, is that they've joined two completely
21 different motions together into one, so it's kind of confusing
22 to answer each motion.

23 Second one is there's an issue with respect to the
24 attorneys' fees on the Lanham Act as to whether or not that
25 motion is timely in light --

1 THE COURT: I understand that's your motion to strike.

2 MR. MURPHY: Right, but then -- if the Court -- if you
3 don't strike it, then I have to respond to the Nightingale
4 exceptional, so are you going to want me to respond to that part
5 of the --

6 THE COURT: Yeah, because I intend to devote one period
7 of time in resolving all of the issues on post-trial costs and
8 fees, so I may grant your motion, I haven't -- so I don't know.
9 But if I don't, you may want to have a response.

10 MR. MURPHY: I understand, your Honor. I mean, I can
11 certainly prepare a response on the Nightingale and explain --

12 THE COURT: Yeah --

13 MR. MURPHY: -- why it's not an exceptional case --

14 THE COURT: -- that's what I want. And if you want to
15 respond to their objections.

16 MR. FINN: Yes, your Honor.

17 MR. MACEY: I have several questions.

18 The first is it is a combined motion --

19 THE COURT: Right.

20 MR. MACEY: -- and under 15 U.S.C. 1157(a), I need to
21 understand from Google if they're seeking attorneys' fees only
22 against the plaintiff and not our firm.

23 MR. FINN: No, I think the motion was pretty clear.
24 It's -- it's against both the plaintiffs and the attorneys.

25 MR. MACEY: So there's a question as to whether you can

1 get --

2 THE COURT: Sanctions -- I can see that under an
3 exceptional case, you're entitled to attorneys' fees --

4 MR. MACEY: Against the party.

5 THE COURT: -- as the winner. That's a separate issue
6 from whether or not we should sanction the client and the
7 attorneys.

8 MR. FINN: That is --

9 THE COURT: Because the damages may be the same or
10 the --

11 MR. FINN: That's correct, Your Honor, not only are the
12 damages the same, basically what the foundation for why it's an
13 exceptional case and why the sanctions are appropriate are
14 pretty much identical.

15 MR. MACEY: I don't -- I don't know that I agree with
16 that.

17 My question is am I responding just to the 1927 or also
18 to the 1115(a), which is only -- the statute says it's only
19 against the party, not against the attorney. I understand 1927
20 is for the -- related to attorneys, but I don't know if I
21 need --

22 THE COURT: I would not think that the attorneys are
23 responsible for the Lanham Act attorneys' fees.

24 MR. FINN: That is correct, Your Honor. I believe
25 that's correct.

1 THE COURT: So the answer is you don't have to do that.

2 MR. MACEY: Thank you. That's my first question.

3 The second question is I didn't raise the issue because
4 I don't have a dog -- I don't have a horse in the race on the
5 1115, but one of his arguments is that -- is whether this is to
6 be handled as a -- no, no, since I'm only 1927, it doesn't
7 matter. Thank you.

8 MR. MURPHY: The other issue is that it's not joint and
9 several. It's direct liability under 1927 --

10 THE COURT: Right.

11 MR. MURPHY: -- so they've grouped us all together.
12 They haven't alleged specific misconduct by any particular
13 attorney and the excess costs attributed to that misconduct.
14 They've just said, Well, we spent a million dollars and,
15 therefore, we want a million dollars and we want it against
16 everybody. Novack & Macey wouldn't be liable if Andrew Fleming
17 had conducted -- had behaved himself improperly. It would be
18 Andrew Fleming because clearly one of the cases they cite, the
19 Citicorp case, says it's not -- it's not nefarious, it's
20 strictly direct liability. It's liability for your action.

21 Now, am I liable -- are they alleging that I'm liable
22 for pleadings I didn't sign? Am I liable for conduct that, you
23 know, wasn't my conduct?

24 So the motion is really -- as I say, your Honor, it's
25 extremely confusing and it makes it difficult to respond. And I

1 think the proper thing is to have them separate the motions.
2 First of all, the motion under 1115(a), what are you claiming
3 against the plaintiff and how is it an exceptional case over
4 there. And the second one is, is file separate 1927s against
5 each attorney specifying the conduct of that attorney.
6 Otherwise, I'm answering for them, they're answering for me,
7 we're answering for the plaintiffs. And they may not like my
8 answers, I may not like theirs. And then we're going to say,
9 well, your Honor --

10 THE COURT: Well, I think that probably the way to
11 handle that is this:

12 If they win on the Lanham Act, then they get their
13 attorneys' fees or at least reasonable attorneys' fees and
14 costs. If they win on the --

15 MR. MACEY: 1927?

16 THE COURT: -- 1927, it would seem to me that the Court
17 would then have to determine what damages are appropriate for
18 that. It would not necessarily mean the entire amount of
19 attorneys' fees, but usually it's the amount -- if it's for
20 unduly prolonging litigation, the attorneys' fees or costs
21 associated with that particular activity.

22 MR. MACEY: Correct.

23 THE COURT: So probably the easiest thing to do would
24 be for the Court to determine whether or not there is any
25 individual responsibility, and I would take up the damages --

1 the amounts assessed to the attorneys separately.

2 MR. MACEY: Okay. Because we don't have, it wasn't
3 filed with the motion, was any indication of their fees. We
4 have an estimate, but there's no documentation supporting that
5 at this point in time. So I assume you're saying if and only if
6 you decide that sanctions should be awarded --

7 THE COURT: If I award sanctions, then I will entertain
8 suggestions as to the appropriate sanctions.

9 MR. MACEY: Thank you. Thank you.

10 MR. MURPHY: One other part of my motion, your Honor,
11 was that I requested a hearing. Obviously we're entitled to a
12 hearing. If the Court is considering awarding sanctions against
13 the attorneys, we're entitled to a hearing. Then I would
14 certainly, based on the allegations, want certain witnesses to
15 attend that hearing, witnesses that they claimed were -- had no
16 participation, that we've alleged had participation, so there
17 may be another issue as to whether or not we're going to need to
18 have a hearing and if so --

19 THE COURT: Put that in. Put that in your papers --

20 MR. MURPHY: That's in my motion now.

21 MR. FINN: Your Honor, so the record is clear, we don't
22 agree that any hearing is necessary nor do we agree that calling
23 the exact witnesses that this Court found were unnecessary to a
24 hearing on why it would be vexatious to have them at deposition
25 and hearings to begin with is appropriate.

1 That said, we have some other difficulties with
2 plaintiffs' and Mr. Murphy's motion --

3 THE COURT: You're entitled to respond to it, so raise
4 it there.

5 MR. FINN: Well, thank you. We certainly will, but I
6 have --

7 THE COURT: And I can determine whether or not, you
8 know, if I felt the hearing is necessary, I would certainly call
9 for one. You say you're entitled to one. You may or may not
10 be. If you are, you would get one. If not, you may or may not
11 get one, depending on whether I think it's necessary or not.

12 MR. FINN: Understood, your Honor.

13 There are two other, before we get to time periods,
14 there are two other issues I wanted to raise with respect to
15 Mr. Murphy's motion regarding motion to strike the motion for
16 sanctions, and that appears to be violations of not only the
17 protective order but the Federal Rules as far as disclosure of
18 privileged information that was represented to us as being
19 destroyed.

20 There's a couple of instances at least, your Honor,
21 which information marked under the protective order as
22 confidential or highly confidential appear without any type of
23 redaction or sealing in the pleading, as well as on page 9,
24 Mr. Murphy -- 9 and other places, Mr. Murphy refers to the fact
25 that at some point we inadvertently provided an unredacted copy

1 of work product and attorney-client privilege information,
2 within which four hours we asked for return and provided a
3 redacted copy, yet we're finding reference to it and summaries
4 of it in this pleading, despite receiving an e-mail, at least
5 from Novack & Macey, that unredacted copies had been destroyed.

6 I've got two big concerns with that.

7 MR. MURPHY: Your Honor, what he's referring to is,
8 first of all, is an invoice that Greenberg & Traurig sent us.
9 Your Honor previously ordered that the plaintiff pay for
10 attorneys' fees and costs for my deposition, the second
11 deposition. And Mr. Finn sent us Greenberg & Traurig's invoice.
12 I seriously doubt that an invoice is considered attorney-client
13 work product or attorney-client privilege when it's sent off to
14 a billing department. It's not going to attorneys, it's going
15 to somebody in Accounts Payable, so I don't think it's even
16 privileged to begin with, first of all.

17 Second of all, I think the Appellate Court made it
18 pretty clear that if it's going to be a trial document, it's not
19 going to be -- if it's going to be introduced at trial, it's not
20 going to be protected under attorney-client privilege because
21 it's going to be an exhibit. And an exhibit you have a right to
22 put it up, so I think on the prior ruling on the writ of
23 mandamus, the Appellate Court made it crystal clear if this is
24 going to be used in evidence, then in that case it's not
25 protected by any -- any protection or, you know, any privilege.

1 It's, you know, it's -- basically it's a trial exhibit.

2 And the invoices -- the reason Mr. Finn doesn't want
3 the invoices in is that those invoices evidence a lot of
4 misconduct by his firm in direct contradiction to things that
5 this Court had ordered him to do. And if he could supply all
6 their invoices --

7 THE COURT: Wait, wait, we're getting --

8 MR. MURPHY: It's getting complicated --

9 MR. FINN: Your Honor, it's a simple issue.

10 Mr. Murphy referred to it himself as an
11 inadvertently-produced invoice.

12 MR. MACEY: I think we can moot the cat fight and just
13 have them include it in their motion -- in their papers because
14 it's not --

15 MR. FINN: Your Honor, I've got an e-mail from -- that
16 shows the history of what exactly transpired.

17 We're talking a four-hour period, through e-mails,
18 where a copy of an invoice that was supposed to be redacted so
19 that they could pay their sanctions was provided, returned, and
20 a new one was provided --

21 THE COURT: What do you suggest?

22 MR. FINN: I just want confirmation that it will be
23 destroyed and that it won't be used in an unredacted form.
24 That's all I'm looking for. And, frankly, if Mr. Murphy thinks
25 he's entitled to use it in an unredacted form, then he needs to

1 follow the Federal Rules of Civil Procedure, which asks for an
2 in camera hearing on the matter, but he hasn't done that. In
3 fact, I didn't even realize he still had it in his possession
4 because I thought, as it was represented to us, copies were
5 destroyed.

6 THE COURT: I'm -- okay.

7 MR. FINN: I'm sorry, Your Honor. It's just a very
8 sensitive area.

9 THE COURT: It may be sensitive. I'm not -- I don't
10 know what you're talking about. I guess that's my --

11 MR. MURPHY: I think perhaps an in camera -- I think an
12 in camera would probably be proper, your Honor --

13 THE COURT: I don't want to look at anything in camera.

14 MR. FINN: Your Honor --

15 THE COURT: If you promised to destroy something --

16 MR. MURPHY: I didn't promise to destroy it. I agreed
17 to remove an e-mail. I removed the e-mail. I had already
18 printed a copy. I didn't throw out the copy. I didn't agree to
19 throw out the copy. I wouldn't throw it out. I mean, it was
20 clear what they were -- it was evidence of misconduct --

21 THE COURT: If you agreed not to use it, then --

22 MR. MURPHY: I didn't agree not to use it.

23 THE COURT: I don't know what -- what did you agree to
24 then?

25 MR. MURPHY: I agreed to destroy the e-mail. I deleted

1 the e-mail. They asked me did I delete the e-mail? I agreed to
2 delete the e-mail.

3 THE COURT: Now you -- now I'm totally confused, which
4 is not all that unusual --

5 MR. MURPHY: What the invoice shows is that Mr. Finn
6 was in contact with Mr. White's attorneys long before --

7 MR. FINN: Your Honor, I don't mean to confuse you. We
8 will bring a motion to correct this situation.

9 THE COURT: All right. Do that. That's the easiest
10 thing to do.

11 And then how much -- okay, responses -- okay, you want
12 to supplement your response.

13 MR. MURPHY: Right, I'll add the Nightingale. I may
14 also be wanting to file a 1927 on behalf of the plaintiffs
15 versus Google.

16 THE COURT: Well, whatever you have -- we have
17 presently pending --

18 MR. MURPHY: Our response --

19 THE COURT: -- cross motions. You want to respond to
20 their motion, so how much time do you need for that?

21 MR. MURPHY: 14 days, your Honor.

22 THE COURT: 14 days.

23 Mr. Macey, is that --

24 MR. MACEY: I'd actually like three weeks to respond to
25 the 1927 --

1 THE COURT: I'll give you 21 days. Both sides 21 days.

2 And Mr. Finn responds to -- why don't you file one

3 response to both the responses --

4 MR. FINN: Certainly. We would like to, to the extent
5 we can, your Honor.

6 THE COURT: All right. Respond to both their
7 responses. I'll give you two weeks after Mr. Macey's response,
8 which is --

9 MR. MACEY: If he wants -- if he wants extra pages
10 because he's responding to both, I have no problem with that;
11 and, likewise, he asked to file a brief right now in excess of
12 the page limit, I have no objection to that either whatsoever.
13 Just for that -- because it's pending today.

14 THE COURT: That motion is granted. Okay. So there's
15 five weeks, and I'll rule by mail.

16 THE CLERK: May 19th for the responses and June 2nd for
17 the reply.

18 MR. MACEY: Thank you.

19 THE COURT: I'll rule on the whole --

20 MR. MACEY: Kit and caboodle. Right.

21 THE COURT: -- by mail, and if you file this other
22 motion, I'll probably --

23 MR. FINN: Your Honor, just so the record is clear, our
24 reply is for a response to the pending motions to strike as
25 well?

1 THE COURT: Yes, that's what I mean. You have a joint
2 response both to his motion to strike and to his motion
3 presumably objecting to the quantity of the fees and whether any
4 fees at all are due.

5 MR. FINN: Fair enough.

6 THE COURT: Okay?

7 MR. MACEY: Thank you for your time this morning,
8 Judge.

9 MR. FINN: Thank you, your Honor.

10 - - - - -

11 C E R T I F I C A T E

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

14 s/s _____
15 GAYLE A. McGUIGAN, CSR, RMR, CRR
16 Official Court Reporter

May 5, 2011

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