

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RED BEND LTD. and
RED BEND SOFTWARE INC.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

CIVIL ACTION
NO. 09-cv-11813

GOOGLE INC.,

Counterclaim-Plaintiff,

v.

RED BEND LTD. and
RED BEND SOFTWARE INC.,

Counterclaim-Defendants.

**GOOGLE INC.'S OPPOSITION TO RED BEND'S
MOTION TO COMPEL GOOGLE'S PRODUCTION OF DOCUMENTS**

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Defendant-Counterclaimant Google Inc. opposes Plaintiffs' Motion To Compel Google's Production Of Documents (the "Motion") (Doc. No. 99). Red Bend seeks the production of documents relating to 1) products not accused of infringement in this case; and 2) irrelevant company-wide competitive and financial documents. Red Bend's Motion should be denied.

I. INTRODUCTION

Red Bend accuses Google's Courgette update algorithm of infringing U.S. Patent No. 6,546,552. Courgette is the only accused product in the case. First Amended Complaint at ¶¶ 16-17 (Dkt. 6); Red Bend Preliminary Infringement Disclosure (Dkt. 75). Google has already produced its documents related to Courgette, the '552 patent, and Red Bend. To date, Google has processed more than 29 million documents collected from over 45 different Google executives, managers, engineers, and programmers, as well as financial and legal personnel. These include the developer of Courgette, his colleagues and supervisors, as well as key personnel and leadership working on the Chrome web browser, Android and Chrome OS projects. Declaration of David Magee in Support of Google's Opposition to Red Bend's Motion to Compel Google's Production of Documents ("Magee Decl."), Ex. A.¹ From this broad search, Google has, to date, produced over 44,000 pages of documents, including all identified documents related to Google's development and use of Courgette, technical information, and the few relevant business planning and financial documents that exist.² To the extent that Google

¹ Google collected documents from this broad group even though Android and Chrome OS are entirely irrelevant to the issues in this case. It is undisputed that Google independently developed the Courgette open source update algorithm. Magee Decl., Ex. B. As Google has previously explained, Google uses Courgette only to generate updates for the Google Chrome web browser on computers running Microsoft Windows; it does not use Courgette to create updates for Android, for the unreleased Chrome OS, or for anything else. *See* Google's Opposition to Red Bend's Motion for Preliminary Injunction at 6-7 (citing evidence) (Dkt. 45). Courgette cannot be used to create updates for mobile devices, or even for other computer systems that do not use both the Intel x86 instruction set and the Windows portable executable file format. *Id.*

² At the end of June, the parties exchanged and negotiated search terms to apply to their respective electronically stored information ("ESI") collections. Prior to this exchange Google had already provided Red Bend with all of its documents related to Courgette from the custodians collected through that date. To the extent not already produced (from additional custodians), Google will continue to provide them. The parties have agreed to an August 20, 2010

has discussed (and in every instance, decided against) writing new software based on Courgette to create updates for software products other than the Chrome web browser for Windows, Google has produced those documents as well. *Id.*, Ex. C.

Having obtained extensive discovery on Courgette, Red Bend now wants more and seeks voluminous discovery of products that are *not* accused of infringement and business components that are irrelevant to the issues in the case. There is no justification for Red Bend's proposed excursion through highly-sensitive but irrelevant Google business information. Red Bend's Motion should be denied.

II. RED BEND'S MOTION TO COMPEL SHOULD BE DENIED.

A. Legal Standards

"Parties may obtain discovery regarding any nonprivileged matter *that is relevant to any party's claim or defense.*" Fed. R. Civ. P. 26(b)(1) (emphasis added). Discovery of information that is merely "relevant to the subject matter involved in the action," may be authorized by the Court only upon a showing of good cause. *Id.*; *see also* Adv. Comm. Notes to the 2000 Amendments to Fed. R. Civ. P. 26(b)(1) ("This rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."); *Nicholas v. Wyndham Int'l Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) ("Even assuming that this information is relevant (in the broadest sense), the simple fact that requested information is discoverable ... does not mean that discovery must be had. On its own initiative or in response to a motion for protective order under Rule 26(c), a district court may limit [such discovery.]").

deadline by which to complete their production of responsive documents identified through searches using negotiated search terms.

This Court’s Local Rules require that a memorandum in support of a motion to compel state with particularity “[e]ach ... request for production... raising an issue to be decided by the court, and response thereto,” followed immediately by “[a] statement of the moving party’s position as to each contested issue, with supporting legal authority.” Local Rule 37.1(b)(4)-(b)(5).³ Red Bend does not discuss the specific Requests for Production upon which it moves other than to list them at pages 3 and 4 of the Motion. Instead, Red Bend obfuscates the issues by arguing in general terms that documents related to “delta updates” and damages are discoverable. That is not the issue before the Court. The issue is whether to order Google to produce all documents responsive to a dozen specific production requests—production requests that, as Google shows below, are deeply flawed, burdensome, and demand discovery that is irrelevant to the issues in this case.⁴

B. “Delta Update”

Google agreed to and did produce documents responsive to Red Bend’s “Delta Update” Requests for Production. *See* Tempesta Decl., Ex. 1 at Responses to Request for Production Nos. 1, 15, 20, 21, 24, and 53. Red Bend has moved this Court for an order compelling Google to produce additional documents responsive to each request in which the term “Delta Update” appears—including requests as to which Google has already produced all responsive, non-privileged documents. Red Bend’s Motion should be denied as to Request for Production Nos. 1, 15, 20, 21, 24, and 53 because Google’s objection to Red Bend’s “Delta Update” definition is well-taken, as are its specific objections to each production request.

³ Local Rule 37.1 also requires a Certification at the end of discovery motions attesting to compliance with the Rule. Red Bend’s Motion lacks a Local Rule 37.1 Certification.

⁴ Although Red Bend’s production requests each seek “all documents” regarding the enumerated subjects, and its Motion appears to seek an order requiring such a production, the Motion does not discuss documents protected from discovery by the attorney-client privilege, the work product doctrine or any other applicable discovery protection.

Red Bend defined “Delta Update” as “any technique for updating an executable program or data table that involves comparing (directly or indirectly) two versions of an executable program or data table to generate a representation of the differences between the two versions.” *See* Tempesta Decl., Ex. 1 at 3. This definition is overbroad in the extreme, vague, and renders unduly burdensome each production request in which it appears.

Differential comparison programs have existed since at least the mid 1970s. Magee Decl., Ex. D. A Wikipedia entry for “Comparison of file comparison tools” lists 29 separate software programs used for differential comparison of computer files. These programs are tools commonly found in the file library of software developers and code writers. Red Bend’s definition would, apparently, cover them all, including software such as *bsdiff* that post-dates the patent-in-suit (and is thus not prior art) and which Red Bend admits does not infringe.

Under Red Bend’s vague definition of “Delta Update,” its production requests seek any document where any file comparison technique (whether open source, proprietary or otherwise) is mentioned. Counsel for Google would be required to develop a list of any program which falls within Red Bend’s broad definition and understand what each program does. Google should not be required to adopt such a vague definition. Further, as mentioned before, difference generators are common in the software industry. Under Red Bend’s definition, Google would need to search the files of each of its technical employees to locate copies or discussions of differential comparison programs. Google has produced its documents related to Courgette, the ‘552 patent and Red Bend. Google should not be required to search this breath of files for such an indefinite definition, particularly when such a burdensome exercise is unlikely to lead to relevant information.

Google therefore understands that the Motion does *not* seek production of privileged or work product documents. If it did Google would, of course, vigorously oppose.

Red Bend attempts to suggest that its discovery requests are reasonable by emphasizing the search terms it asked Google to run. Red Bend demanded that Google run the compound search ((delta or compress* or differential or diff) w/3 (updater or updates or patch*)) and (Chrome or Chromium or ChromeOS or ChronOS or Android or Courgette or Omaha or “Google Updater” or “Red Bend” or RedBend),⁵ in which it chose to mix accused and non-accused product names. Red Bend attempts to deflect the burden of this request by suggesting that the search resulted in 12,860 hits. This is a red herring. The fact that Red Bend mixes accused and non-accused Google products into a compound search does not somehow transform the hits on the non-accused and irrelevant products into relevant, responsive documents. Further, Red Bend’s most recent list of search terms (not just the aforementioned one) results in over 71,000 hits.

Similarly, Red Bend ends its Delta Update argument with the conclusory statement that Google should produce Delta Update documents from “the files of all relevant custodians at Google, including Android and Chrome OS engineers.” With this conclusion, Red Bend again obfuscates who the relevant custodians are in this case by attempting to lump the non-accused Android and Chrome OS teams in with the Chrome web browser team.

Red Bend has never been willing to consider narrowing the scope of its overbroad “Delta Updates” definition, or the scope of any specific production requests in which it appears. In light of Red Bend’s erroneous definition, Google properly limited its responses to requests seeking discovery regarding “Delta Updates” to information about Courgette, the only product accused of infringing.

⁵ This single compound search breaks down into 125 separate searches.

1. Request for Production No. 1

All documents reflecting or referring to techniques for generating and/or distributing Chrome updates used by Google prior to its use of Courgette, including but not limited to any Delta Update technique used to update Chrome prior to Courgette.

Red Bend has never articulated—in either the meet and confer process or in the Motion—what it believes that it has not received in response to Request No. 1. This request is apparently before the Court simply because it contains the term “Delta Update.” Google, in fact, has responded and produced documents responsive to Red Bend’s Request for Production No. 1.

As Red Bend has been aware since filing suit, when Google launched the Chrome web browser in September 2008 it used an open source software program called “bsdiff” to create updates for it. *See* Magee Decl., Ex. A.⁶ Although it is not prior art to the ‘552 patent, the bsdiff code has been available in open source since 2003. Magee Decl., Ex. E.

Red Bend has repeatedly confirmed that bsdiff does not infringe the ‘552 patent. Mr. Salinger, Red Bend’s CEO testified during his deposition that bsdiff is an open source alternative for creating differential updates and that Red Bend does not and never has accused bsdiff of infringing the ‘552 patent. Magee Decl., Ex. F at 83:21-84:1. Given Red Bend’s concession that bsdiff is a non-infringing substitute, it does not need to take discovery from Google of all documents related to it; Red Bend is well aware of bsdiff and how it works.

Google has nevertheless produced documents confirming its pre-Courgette use of bsdiff to create updates for the Google Chrome web browser on computers running Microsoft Windows.

Under Rule 26(b)(2)(C)(iii) the court is charged with the instruction to limit discovery if

⁶ A copy of this same blog post (“Smaller is Faster (and Safer Too)”) was attached as Exhibit 2 to the November 17, 2009 Declaration of Jennifer C. Tempesta in Support of Plaintiff’s Motion for a Preliminary Injunction (Dkt. 9A), and Red Bend and its technical expert relied upon it heavily.

it determines that “the burden or expense of the proposed discovery outweighs its likely benefit.” Google has complied with Red Bend’s request for documents “reflecting” or “referring” to “bsdifff” by producing a significant number of documents relating to bsdifff updates to the Chrome browser. Red Bend has never attempted to demonstrate why it needs voluminous discovery on a product with which it is already familiar, and as to which Google has already produced the relevant documents. It has no legitimate need for every scrap of paper (or collection of pixels) that refers to a non-infringing product like bsdifff. Google therefore requests that the Court deny the Motion as to Request No. 1.

2. Request for Production No. 15

All documents concerning or relating to Google’s actual or potential use of Delta Update techniques, including but not limited to Courgette, to update Android or any other software or firmware installed on a mobile device running Android, including but not limited to software or firmware supplied or developed by Adobe Systems Incorporated for use with Android.

As Google set out in its Preliminary Injunction Opposition papers, Android is not at issue in this case. Google does not use Courgette to update Android mobile devices, and Red Bend does not accuse Android of infringing the ‘552 patent. Android is an open source operating system for mobile devices developed by the Open Handset Alliance, a group of 76 technology and mobile companies who collaborated to accelerate innovation in the mobile device space. Google is a member of the Open Handset Alliance and is a contributor to the Android project.

Numerous mobile phone manufacturers and mobile network operators (among others) offer Android-based products. With respect to some—but far from all—Android-based products, Google has a relationship with the manufacturer and/or operator to manage the

software installation on the handset and provide over-the-air (“OTA”) software updates.⁷ Google does *not* use the Courgette algorithm to provide OTA software updates to these Google-managed devices. See Declaration of Brian Bershad (“Bershad Decl.”) ¶ 4 (Dkt. 48); Ex. G at RedBend0009069. Nor could it do so given that Courgette creates diff files for x86 executables—that is, for software that runs on the chipset architecture commonly found in personal computers.⁸ Bershad Decl. ¶ 5 (Dkt. 48).

As to the Google-managed Android devices, Google uses bsdiff to create updates. As Red Bend is aware, Google considered the use of Courgette for Android updating, but decided against doing so because of the amount of work required to adapt Courgette to the Android platform. Magee Decl., Ex. C. Google has produced these documents to Red Bend and has also produced documents demonstrating that it used bsdiff to create updates for a limited number of Google-managed devices running on the Android platform.

Red Bend argues that it is entitled to take discovery regarding any “technique that potentially infringes” the ‘552 patent. Motion at 5. That argument might have weight if Red Bend had ever indicated that *any* difference generator other than Courgette—whether used by Google or anybody else—“potentially infringes” the ‘552 patent. Red Bend is not entitled to burden Google with discovery regarding every difference generator that has ever existed so that

⁷ With respect to devices where Google does not have such a relationship with the manufacturer or operator, Google does not provide OTA software updates to the device at all. Instead, companies such as Red Bend provide OTA software updates to such devices. It is precisely because the Android operating system does not come with a default difference generator utility that Red Bend’s CEO, Yoram Salinger described Android as an “opportunity” for Red Bend. Magee Decl., Ex. E at 82:12-24; Ex. G RedBend0009059 [REDACTED]

⁸ Stephen Adams, the Google engineer who created Courgette, has encouraged other product divisions within Google to adopt Courgette, but none have done so. Bershad Decl. ¶ 4. The Android team, for example, declined to do so for several reasons including the technical challenges involved. Magee Decl., Ex. C. Red Bend has in fact studied Google’s approach and does not accuse Android, Chrome OS or bsdiff of infringing. First Amended Complaint (Dkt. 6) at ¶¶ 16-17 & Ex. E at 83:21-84:1.

Red Bend can then evaluate each to decide whether it “potentially infringes” the ‘552 patent. Red Bend has made it clear that Courgette, and only Courgette, is the only product that “potentially infringes” the ‘552 patent that is at issue in this case. First Amended Complaint at ¶¶ 16-17 (Dkt. 6); Magee Decl., Ex. A; Red Bend Preliminary Infringement Disclosure (Dkt. 75).⁹

Nor are the requested documents relevant to the invalidity analysis. Although secondary considerations are relevant to the obviousness analysis, the document request is not reasonably calculated to lead to such evidence. To the extent that Google might have documents relevant to long felt need for the solution of the ‘552 patent, the failure of others to achieve the solution of the ‘552 patent, praise for the claimed invention, or industry acceptance of the invention, Red Bend already has those documents because Google has produced its documents about Courgette, the ‘552 patent and Red Bend. “[O]bjective evidence of non-obviousness must be commensurate in scope with the claims which the evidence is offered to support.” *In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); *see also Asyst Technologies, Inc. v. Emtrak, Inc.*, 544 F.3d 1310, 1316 (Fed. Cir. 2008) (following *Grasselli* and rejecting purported evidence of long-felt need for the invention and evidence of industry praise that did not have the required nexus to the claimed invention). A hypothetical general discussion, outside the context of the ‘552 patent or Courgette, about the pros and cons of various non-infringing difference generators would shed no light on invalidity. *Contemporary* discussions have no bearing on obviousness at all. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966) (secondary considerations might “give light to the circumstances surrounding *the origin of* the subject matter sought to be patented”) (emphasis added). The question under 35 U.S.C. § 103 is whether the claimed

⁹ In accordance with Local Rule 16.6 and as agreed to by the parties in their stipulated schedule, the time has past for Red Bend to amend its infringement contentions to accuse additional products.

invention was obvious at the time of the invention. *Id.* at 686. Red Bend filed the application for the '552 patent eleven years ago, in August 1999.

Red Bend's suggestion that it needs production of bsdiff-related Android documents for purposes of identifying prior art and non-infringing substitutes is equally misplaced. As discussed in relation to Request No. 1, bsdiff is not prior art and the code is publicly available. For the reasons discussed above, bsdiff has nothing to do with the validity of the '552 patent. Given Red Bend's concession that bsdiff is a non-infringing substitute, it does not need to take discovery from Google of all documents related to bsdiff; Red Bend is well aware of bsdiff and how it works.

Finally, Red Bend suggests that Google is somehow applying a limited view of what does or does not constitute "Courgette," and that its over-broad definition of "Delta Update" is justified lest Google withhold documents about Courgette-under-an-assumed-name. Motion at 5 & 7. This is a non-issue. As Google has repeatedly informed Red Bend, Google understands Courgette to refer to the differential compression algorithm developed by Google engineer Stephen Adams, and that Red Bend accuses of infringing. *See* Tempesta Decl., Ex. 3 at 5. Google developed Courgette independently, so there is nothing with a different name from which it was derived.¹⁰ *Id.* Nor has Google (or anyone else as far as Google knows) created any derivative works based on Courgette, so there is nothing that could be described as Courgette under a new name. *Id.* Red Bend's contrary intimations are baseless. Google therefore requests that the Court deny the Motion as to Request No. 15.

3. Request for Production Nos. 20, 21 and 24

Red Bend's Request For Production No. 20 seeks:

¹⁰ Google has already searched its source code trees for "Courgette." Aside from dictionary entries describing "courgettes" as zucchinis, Google has provided all information regarding Courgette.

All documents concerning or relating to Google's research, development or implementation of any Delta Update technique (including but not limited to Courgette).

Red Bend's Request for Production Nos. 21 and 24 are redundant of and encompassed within Request for Production No. 20. Request for Production No. 21 calls for:

All documents concerning or relating to Google's actual or potential use of any Delta Update technique (including but not limited to Courgette).

Request For Production No. 24 demands:

All documents concerning or relating to any Delta Update used by Google to update software on mobile devices, including cell phones.

Google has produced to Red Bend all non-privileged documents related to its "research, development or implementation" of Courgette (Request No. 20). This includes all documents about its "use or potential use" of Courgette (Request No. 21). It also includes documents sufficient to show that Google does not (and cannot) use Courgette to "update software on mobile devices" (Request No. 24), and that it instead uses bsdiff to create updates for the relatively small number of Google-managed phones running on the Android platform. This is more than reasonable.

Red Bend's production requests seek nothing less than every document in the possession of any one of Google's thousands of technical employees and resident contractors that relates to any and every difference generator utility ever "researched," developed or used by any of them. To identify this information, Red Bend would have Google collect the files from at least each and every one of these custodians working on the countless software programs under the Google corporate umbrella. Given Google's agreement to produce all documents related to Courgette, these production requests will result in no additional information about the accused product.

This exercise would be prohibitively expensive and unlikely to turn up relevant information. Google therefore requests that the Court deny the Motion as to Request Nos. 20, 21 and 24.

4. Request for Production No. 53

All documents concerning advertisements and promotional materials used by Google to promote Courgette in connection with the Chrome web browser or with any other product that uses a Delta Update.

Google has already searched for and produced all non-privileged documents responsive to Request for Production No. 53. As noted above, Google has produced all identified documents related to Courgette, and thus to any documents that “promote Courgette in connection with the Chrome browser.” Because Courgette is not used to create updates for any Google product other than the Chrome web browser for Windows, and there are no documents “concerning advertisements and promotional materials used by Google to promote Courgette in connection with ... any other product that uses a Delta Update.” Google requests that the Court deny the Motion as to Request No. 53.

C. “Damages- Related Documents”

Red Bend’s “Damages-Related” category of document requests demand that Google produce documents for each of its intellectual property purchases or company acquisitions from the inception of the company. The requests would also have Google produce any and all of its license agreements for each of its products or corporate relationships. These requests are overbroad and harassing. Although Red Bend’s Motion argues in generalities, here again, a review of each disputed request demonstrates the extent to which Red Bend is over-reaching.

Google worked to reach a reasonable compromise on these issues with Red Bend, only to be met with intransigence. Google searched and produced documents from Brian Rakowski, Google’s Product Manager Director for Chrome, and Linus Upson, a Vice President of

Engineering for Chrome. Together, Mr. Rakowski and Mr. Upson are responsible for overall Chrome strategy. In addition, Google offered to gather documents from Job Lawrence, Google's Senior Manager of Partner Strategy & Analytics, who works on the Chrome web browser. Mr. Lawrence works closely with a variety of functions across the company and advises senior management regarding, among other things, cost/benefit and valuation studies/analyses related to Google's development and distribution of the Chrome web browser. In addition to Mr. Rakowski and Mr. Upson, Mr. Lawrence is the person most knowledgeable about the identifiable, tangible benefits, if any, to Google from the Chrome web browser. In an effort to reach a compromise as to many of the same production requests on which Red Bend now moves, Google offered to collect and search Mr. Lawrence's files for documents pertinent to Red Bend's Request for Production Nos. 44, 54 and 60 (as to Chrome/Courgette). Google also offered to produce any agreements whereby third parties distribute Chrome to their users. It did so even though it believes that those requests are improper, burdensome, and call for irrelevant but highly sensitive information. Red Bend flatly refused to compromise. Whereas Google had offered to give Red Bend financial and business planning documents in a sensible and structured manner, Red Bend insisted on the less efficient, far more burdensome approach: a combing of every document from all possible custodians based on search term hits.

1. Request for Production No. 44

Red Bend's Request For Production No. 44 seeks:

All documents concerning or relating to the commercial success of Google's Chrome web browser.

The "commercial success" of the Google Chrome web browser is not relevant to damages. The eighth *Georgia-Pacific* factor is "[t]he established profitability of the product made under the patent; its commercial success; and its current popularity." *Georgia-Pacific*

Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (emphasis added). The Chrome web browser is not a “product made under the patent.” Red Bend contends, of course, that Courgette practices the ‘552 patent, and Google disagrees; but there is no issue as to whether the Chrome web browser practices the ‘552 patent.

Red Bend mentions this Request only in passing, and has made no effort to justify its broad request for such irrelevant, sensitive, and potentially voluminous, business information. The Motion should be denied as to Request for Production No. 44.

2. Request for Production No. 46

Red Bend’s Request For Production No. 46 seeks:

All documents concerning or relating to any value or benefit to Google, whether direct or indirect, attributable to its use, supply or distribution of the Chrome web browser and/or the Chrome OS.

Google does not dispute that Red Bend is entitled to discover facts related to the value or benefit to Google of Courgette. That is why it agreed to, and did, produce documents responsive to Red Bend’s Request for Production No. 17 (requesting documents related to the “commercial benefits to Google resulting directly or indirectly from its use of Courgette”). *See* Tempesta Decl., Ex. 2 at 21.

Red Bend, however, demands discovery regarding the value to Google of products that are not accused of infringement—indeed of still-unreleased products like the Chrome OS that have nothing whatsoever to do with Courgette. To the extent it pertains to the Chrome web browser, Request for Production No. 46 is redundant of Request for Production No. 44 and should be denied for the same reasons. Unmoored from the value, if any, of Courgette, the value of the Chrome web browser is simply irrelevant.

Red Bend’s demand for documents regarding the “value or benefit to Google, whether direct or indirect, attributable to its use, supply or distribution of ... the Chrome OS” is entirely

objectionable. The Chrome OS, like Android, is not an accused product. It has not yet been publicly released, and Google has no current plans to use Courgette in conjunction with the Chrome OS. To the contrary, Chrome OS uses the admittedly non-infringing bsdiff. *See, e.g.,* <http://git.chromium.org/cgi-bin/gitweb.cgi?p=bsdiff.git>. Red Bend has made no effort to show how highly confidential competitive information relating to the Chrome OS have any bearing on the issues of this case. Google requests that the Court deny the Motion as to Request No. 46.

3. Request for Production No. 52

All documents concerning Google's software and/or patent licensing practices, including licenses that Google has entered into, offers of license made and/or received by Google, and negotiations for such licenses (not including off-the-shelf licenses).

Red Bend's Request for Production No. 52 seeks all documents related to literally every software or patent license Google—a very large technology company—has ever entered into or discussed. Not only does the request implicate highly sensitive and confidential business information, including information about third-parties, but its likely to be overwhelmingly irrelevant.

Red Bend's only justification for this request (and Request for Production No. 59) is the flat assertion that valuation and licensing practices may be relevant to damages. Motion at 8. However, Red Bend's reliance on *Georgia-Pacific* is misplaced. The second *Georgia-Pacific* factor is “[t]he rates paid by the licensee for the use of other patents *comparable* to the patent in suit.” 318 F. Supp. at 1120 (emphasis added). This factor cannot support Red Bend's demand for *all software* licenses. As to patent licenses, the request extends far beyond those for comparable technology. The other case Red Bend string cites, *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009), was criticized recently by a panel of the Federal Circuit. In *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870 (Fed. Cir. 2010), the Federal

Circuit criticized the *Lucent* damages analysis as based upon little more than a recitation of royalty numbers where it was doubtful that the technology of those license agreements was in any way similar to the technology at issue. In the case before it, the *ResQNet.com* court criticized the plaintiff's damages expert for using licenses with no relationship to the claimed invention in an effort to drive up the royalty rate up to unjustified double-digit levels. *Id.* (rejecting damages analysis based on licenses that did not mention the patents in suit or show any other discernible link to the claimed technology).

Google objects to the production of its licenses and related documents having nothing to do with the accused technology and requests that the Court deny the Motion as to Request No. 52.

4. Request for Production No. 59

All documents showing Google's practices, methods and/or techniques for valuing the technology of Third Party companies, including but not limited to its valuation practices, methods and techniques it has applied to the technology, products and/or services offered by Third Party companies.

Red Bend's Request No. 59 has no bearing at all on the issues in this case, and it seeks highly sensitive information that is totally irrelevant. Red Bend seeks access to documents related to any of Google's technology acquisitions as well as its acquisition of over seventy companies since Google's founding. There is no conceivable justification for the request, and Red Bend makes no genuine effort to offer one. It refers to this Request only in passing, and its unexplained reliance on *Georgia-Pacific* and *Lucent* has no bearing here. As to this Request too, Red Bend's Motion should be denied.

D. "DELTA UPDATE" AND "FINANCIAL RELATED DOCUMENTS"

Red Bend describes two of its production requests, Nos. 54 and 60, as pertinent to both the "Delta Update" and "Damages-Related" requests. As to these Requests, the problems are

multiplied.

1. Request for Production No. 54

All business plans or reports, market analyses, marketing plans, sales plans, operating plans, sales or market projections, or similar documents prepared by Google or anyone acting on its behalf, including consultants, referring or relating to the Chrome web browser or Google's Chrome operating system(s) that use, or will potentially use, Delta Updates.

Red Bend's Request No. 54 seeks highly sensitive information that is totally irrelevant. Red Bend demands access to "[a]ll business plans or reports, market analyses, marketing plans, sales plans, operating plans, sales or market projections, or similar documents for the Chrome web browser and unreleased Chrome OS. There is no conceivable justification for the request, and Red Bend makes no genuine effort to offer one. The Motion is devoid of any discussion of this request other than to generally list "business plans and related documents" as something it seeks. Further, any documents directed to the Chrome OS are, as discussed in relation to Request No. 46, highly objectionable. Red Bend has made no effort to show how documents relating to the Chrome OS are relevant to any issue in the case. Red Bend is seeking highly confidential competitive information of an as yet to be released product having no relation to the issues in this case. Google requests that the Court deny the Motion as to Request No. 54.

2. Request for Production No. 60

Documents sufficient to determine actual and anticipated gross sales, net sales, gross profit, operating profit and/or pretax profit related to Google products updated using a Delta Update technique, including Courgette.

Google does not have documents related to its "anticipated gross sales, net sales, gross profit, operating profit and/or pretax profit related to ... Courgette." Google does not sell or otherwise monetize the distribution or use of Courgette; rather Google has made Courgette

available for free in open source. Google likewise makes the Chrome web browser freely available. To the extent the request seeks information related to the value to Google of the Chrome web browser, it is redundant of Request for Production No. 46, and should be denied for the same reasons.

The sales and profitability of Google products that are neither accused of infringement nor updated using Courgette are completely irrelevant, and there is no justification for Red Bend's demand for such sensitive information. Google therefore requests that the Court deny the Motion as to Request No. 60.

III. CONCLUSION

Google long ago produced all of its documents about the accused product, and it either has produced or has already agreed to produce documents pertinent to any remedy analysis. It objects, however, to Red Bend's effort to use this case as a pretext for discovery of highly sensitive information about products that are not at issue. Google respectfully asks that the Court deny Red Bend's Motion.

Dated: August 12, 2010

Respectfully Submitted,

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By its attorneys,

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