

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
EASTERN DIVISION**

RED BEND LTD., and  
RED BEND SOFTWARE INC.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 09-cv-11813-DPW

**PLAINTIFFS' THIRD NOTICE OF POST-HEARING  
FACTUAL DEVELOPMENTS IN THE REEXAMINATION  
PROCEEDING AT THE U.S. PATENT AND TRADEMARK OFFICE**

On October 28, 2010, the U.S. Patent and Trademark Office (“PTO”) effectively ended the ongoing reexamination proceeding involving Red Bend’s patent-in-suit (U.S. Patent No. 6,546,552, hereinafter “the ‘552 Patent”), and issued a Notice of Intent to Issue a Reexamination Certificate confirming the patentability of all claims of the ‘552 Patent. (*See* Exhibit 1 hereto, 10/28/10 Notice of Intent to Issue *Ex Parte* Reexamination Certificate).<sup>1</sup> This factual development is highly relevant to Red Bend’s pending motion for a preliminary injunction (Dkt. 8) because it is further evidence of the validity of the ‘552 Patent, and confirms that no substantial question of validity exists with respect to the ‘552 Patent. *See, e.g., Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 847-48 (Fed. Cir. 2008) (“examiner’s confirmation of the patentability of every claim in [the patent during reexamination] may be relevant to [patentee’s] likelihood of success.”).

---

<sup>1</sup> *See also* Exhibit 2, Red Bend’s 11/2/10 Comments on Statement of Reasons for Patentability and/or Confirmation.

Google, in opposing Red Bend's motion for a preliminary injunction, argued that "several early prior art references raise substantial questions of invalidity" (*See* Dkt. 55, Google's Opposition to Red Bend's Motion For a Preliminary Injunction at 27), and urged the Court to deny Red Bend's motion for a preliminary injunction based, in part, on the PTO's grant of its request for reexamination of the '552 Patent. (*See id.* at 25-28; 4/4/10 Hearing Tr. at 58-62 ("the PTO's action on a request for reexamination is directly relevant to the issue of whether the defendant has raised a substantial question of validity")). *See also* Dkt. 81, Google's Post-Hearing Notice (citing several cases where the court relied on PTO reexamination outcomes as evidence in determining whether to grant a preliminary injunction motion)).

The PTO has now spoken, rejecting Google's arguments. Each of those "early prior art references"<sup>2</sup> have now been placed before, and considered by, the PTO -- which has confirmed the patentability of all claims, without requiring that any amendment or change be made to any claim. Now that the "examiner considered the asserted prior art and basis for the validity challenge" Google, as the party challenging patent validity will bear a "particularly heavy" burden of proof at trial. *Impax Labs., Inc. v. Aventis Pharms., Inc.*, 545 F.3d 1312, 1314 (Fed. Cir. 2008). This is noteworthy because "the trial court must decide whether to grant a preliminary injunction in light of the burdens the parties will bear at trial." *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1379 (Fed. Cir. 2009). In view of this new evidence, Red Bend respectfully suggests that Google has failed to prove that "it is more likely than not that [Google] will be able to prove at trial, by clear and convincing evidence, that the patent is invalid." *Id.* For this reason, Google's purported invalidity defense "lacks substantial merit." *See id.* at 1377-1380. Red Bend therefore respectfully requests that the Court grant its pending motion for a preliminary injunction.

---

<sup>2</sup> A complete list of the references considered by the PTO during the reexamination is attached hereto as Exhibit 3.

Dated: November 3, 2010

Respectfully submitted,

By: */s/ Jennifer C. Tempesta*

---

Jennifer C. Tempesta

Daniel Cloherty (BBO# 565772)  
Dwyer & Collora, LLP  
600 Atlantic Avenue - 12th Floor  
Boston, MA 02210-2211  
Telephone: (617) 371-1000  
Facsimile: (617) 371-1037

Robert C. Scheinfeld (RS-2632) (*pro hac vice*)  
Eliot D. Williams (EW-6560) (*pro hac vice*)  
Jennifer C. Tempesta (JT-4841) (*pro hac vice*)  
Baker Botts L.L.P.  
30 Rockefeller Plaza  
44th Floor  
New York, New York 10012-4498  
Telephone: (212) 408-2500  
Facsimile: (212) 408-2501

*Attorneys for Plaintiffs Red Bend Ltd. and  
Red Bend Software Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 3, 2010.

By: */s/ Jennifer C. Tempesta*

---

Jennifer C. Tempesta