

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Tuesday, January 19, 2010
11:03 a.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter

John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617)439-3214

1 APPEARANCES:

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6 On behalf of Red Bend Software.

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9 On behalf of Red Bend Software.

8 BINGHAM McCUTCHEN LLP
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13 On behalf of Google, Inc.

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1 (The following proceedings were held in open court
2 before the Honorable Douglas P. Woodlock, United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on
6 Tuesday, January 19, 2010):

7 THE CLERK: All rise.

8 (The Honorable Court entered the courtroom at 11:00 a.m.)

11 Calling the case Civil Action 09-11813, Red Bend
12 Software, Inc. versus Google, Inc.

15 MS. BAKER MANNING: Good morning, your Honor. Susan
16 Baker Manning, with Bingham McCutchen, for Google, Inc. With
17 me is my colleague, David Magee.

18 MR. CLOHERTY: Good morning, your Honor. Daniel
19 Cloherty, here on behalf of Red Bend.

20 MR. SCHEINFELD: Good morning, your Honor. Robert
21 Scheinfeld, Baker Botts, on behalf of Red Bend.

22 THE COURT: Well, I cannot recall, Mr. Scheinfeld;
23 were you present at the scheduling conference?

24 MR. SCHEINFELD: Well, yes, your Honor. I must have
25 made a great impression

1 THE COURT: I gather you did not pick up the tone of
2 what I had to say?

3 MR. SCHEINFELD: Your Honor, I did pick up the tone of
4 what you had to say.

5 THE COURT: Well, what I had to say was, basically,
6 that I was going to expedite this matter --

7 MR. SCHEINFELD: Yes.

8 THE COURT: -- to permit your claim to be put forward,
9 but that I was going to permit some discovery. You have
10 decided to interfere with that. I am sorry, but this is
11 outrageous, clear and simple, outrageous.

12 MR. SCHEINFELD: Your Honor, I apologize.

13 THE COURT: Well, you should apologize, and I
14 appreciate the apology. It is a little late, but I appreciate
15 the apology. Now let me tell you --

16 MR. SCHEINFELD: Okay.

17 THE COURT: -- you have also put off your schedule for
18 your hearing because of that. So, you want to play a game of
19 chicken; you played and you lost.

20 MR. SCHEINFELD: Your Honor, I apologize. Obviously,
21 I completely misread the Court, and I apologize for that. I
22 understood from the Court --

23 THE COURT: Let us talk about where we are going from
24 here.

25 MR. SCHEINFELD: Okay.

1 THE COURT: You can apologize to your client, too, if
2 that is what is necessary, if you were acting on your own as
3 opposed to serving interests of your client that are
4 inconsistent with an orderly and fair resolution of the case.

5 But that is not my interest. My interest is to ensure
6 that there be a fair, efficient, prompt, orderly resolution of
7 the issues that are teed up.

8 So, you said, "No," on January 6th. Now we have just
9 managed to extend the time period from at least January 6th to
10 January 19th. That amounts to 13 days, and it may be a little
11 longer for this strategic choice.

12 When are your clients going to be available -- or the
13 two deponents going to be available?

14 MR. SCHEINFELD: For deposition, your Honor? The
15 first week in February.

16 THE COURT: What are we talking about, if not for
17 depositions?

18 MR. SCHEINFELD: Obviously, again, I apologize.

19 THE COURT: No; we are past apologies. We are on to
20 the question of what we are going to do about this profound
21 mistake that you made or, more accurately, the plaintiff
22 seeking extraordinary relief from the Court made in deciding
23 that they would not make available the two most critical
24 witnesses?

25 MR. SCHEINFELD: Your Honor -- if I may, your Honor?

1 THE COURT: You will have an opportunity. What I will
2 do is, I will set a schedule, and then, at the conclusion of
3 all of this, we will listen to what you have to say by way of
4 apology or whatever you want to say. But the short of it is, I
5 am here to set a schedule. I was here to set a schedule
6 before. I set a schedule that I thought was relatively prompt,
7 although you wanted it even faster.

8 MR. SCHEINFELD: I did.

9 THE COURT: Now, having urged me to hurry up, you
10 asked, in effect, to wait. So, let us get to the schedule.
11 Your clients will be -- or the two deponents will be available
12 the first week in February; is that right?

13 MR. SCHEINFELD: That's correct, your Honor.

14 THE COURT: Okay. Do we have to set a particular
15 date, or is the tenor clear enough now so that I do not have to
16 set a particular date?

17 MR. SCHEINFELD: Your Honor, the tenor is very clear.

18 THE COURT: Okay.

19 MR. SCHEINFELD: I mean, February -- the week of
20 February -- the first week in February should work. I have
21 consulted with my client already. He is available the first
22 week in February. I believe the experts should be available
23 the Friday before that first week or at least the Monday or
24 Tuesday following.

25 Your Honor, if I may? Just to address the issue of

1 depositions, we got the notice that Google wanted depositions
2 the first week in January, seeking the deposition five business
3 days later. My client was not available at the time, nor was
4 the expert.

5 THE COURT: That is not the grounds on which you
6 rejected the deposition.

7 MR. SCHEINFELD: It was one of the grounds, your
8 Honor.

9 THE COURT: No. It was the subsidiary grounds and not
10 the primary grounds. The primary grounds is that I did not
11 order it. You got it wrong. You got it absolutely wrong.

12 MR. SCHEINFELD: When your Honor said that you would
13 not hear -- you're right, your Honor. I don't want to argue.

14 THE COURT: Do you want to have this discussion with
15 me about what I meant when I said certain things?

16 MR. SCHEINFELD: No, no, your Honor; I don't.

17 THE COURT: What I will do is I will consult the
18 person who made the order. In fact, I consulted him over the
19 weekend, when I read these outrageous papers.

20 MR. SCHEINFELD: Okay.

21 THE COURT: I looked in the mirror, and I said, "What
22 did I mean by that? Could I have meant not to have a
23 deposition?" And the mirror said back to me, "No. Nobody in
24 his right mind would have thought that."

25 MR. SCHEINFELD: I apologize.

1 THE COURT: All right. Do you understand?

2 MR. SCHEINFELD: Yes, I do, your Honor.

3 THE COURT: So, depositions when, Ms. Baker Manning?

4 MS. BAKER MANNING: Sir, unfortunately, we have a
5 couple of schedule conflicts that first week of February. We
6 may need to go over into the second week.

7 THE COURT: What are your schedule conflicts?

8 I feel like I am the chaperone at a tea dance.

9 MS. BAKER MANNING: I am happy to work it out with
10 Mr. Scheinfeld, as long as we can go over into the next week.
11 I have a Federal Circuit oral argument that week, into that
12 week, that I simply can't move.

13 THE COURT: All right.

14 MS. BAKER MANNING: So, if we could, with your Honor's
15 permission, go over into the following week of February, I am
16 quite confident, given the clarity of your Honor's directions,
17 we can find specific times that work for everybody involved to
18 take depositions of these two witnesses.

19 THE COURT: All right. Now, you had a subsidiary
20 point that you wanted to make about not having depositions of
21 your own. You can have depositions of your own, if you would
22 like to have some depositions. Do you want it in depositions,
23 or was that simply makeweight?

24 MR. SCHEINFELD: No, your Honor. No. I would like
25 depositions.

1 THE COURT: When are they going to take place?

2 MR. SCHEINFELD: As soon as we receive their
3 opposition and learn who --

4 THE COURT: Oh, no, no. You are not going to get
5 their opposition before all of the depositions go forward on
6 this.

7 MR. SCHEINFELD: Your Honor, we don't know who their
8 declarants are, so we would like the depositions of their
9 declarants.

10 THE COURT: You want the depositions of their
11 declarants --

12 MR. SCHEINFELD: Correct.

13 THE COURT: -- before you file your reply?

14 MR. SCHEINFELD: Not necessarily. As long as we have
15 a chance to provide a supplemental paper, if necessary, after
16 the reply.

17 THE COURT: Well, what supplemental paper --

18 MR. SCHEINFELD: Yes, your Honor. Yes.

19 THE COURT: You do not want a reply, you want a
20 "supplemental paper." Is that a ruse by another name?

21 MR. SCHEINFELD: No, your Honor, it is not.

22 THE COURT: It is a reply, right?

23 MR. SCHEINFELD: It is a reply.

24 THE COURT: Okay. Let us call things what they are.

25 MR. SCHEINFELD: Yes, your Honor. If it is possible,

1 we would like to have the depositions of Google's declarants
2 that are submitted with their opposition papers --

3 THE COURT: Okay.

4 MR. SCHEINFELD: -- before our reply is due.

5 THE COURT: All right. That seems fair to me.

6 MS. BAKER MANNING: That's fine. That's always been
7 our position, your Honor.

8 THE COURT: So, now into schedule. Your reply will
9 presumably -- your opposition will be presumably after the
10 depositions.

11 MS. BAKER MANNING: Yes, sir; that's our hope.

12 THE COURT: And your reply or supplemental papers will
13 be after you have a chance to do your depositions.

14 Now, do I have to set the schedule for you for all of
15 this, the dates of depositions and so on?

16 MS. BAKER MANNING: I don't think so, your Honor.

17 MR. SCHEINFELD: We will work it out.

18 THE COURT: Yes, I hope you will. Now, let us talk
19 about when we are going to have a hearing on this, in light of
20 this contretemps. It seems to me that what Red Bend has done
21 has bought itself at least another month and, perhaps, more.

22 Realistically, when do you think your opposition will
23 be filed?

24 MS. BAKER MANNING: Well, if I can start with the
25 hearing, for a moment, your Honor, and then work back to your

1 question, we have a rather significant difficulty engendered by
2 this delay with regard to the hearing. Google has made it
3 clear from the time we were hired in this case that they would
4 like my colleague, William Abrams, to actually argue the
5 preliminary injunction hearing. Mr. Abrams has a month-long
6 trial that starts the beginning of March and will consume the
7 entirety of the month of March. So, in order for Mr. Abrams to
8 be available, given his trial conflict, we would need to be
9 looking at April.

10 THE COURT: Well, I have to tell you, I am indifferent
11 to Mr. Abrams' trial schedule; so, we are not scheduling it to
12 accommodate Mr. Abrams' or your client's preferences, not a
13 preliminary injunction that you are defending.

14 MS. BAKER MANNING: Okay.

15 THE COURT: So, now let us talk about it in functional
16 terms. When, realistically, do you think you will have your
17 opposition?

18 MS. BAKER MANNING: If we can take the witnesses by --
19 because we are going to be going into that second week of
20 February -- we could file our paper certainly March 5th.

21 THE COURT: March 5th?

22 MS. BAKER MANNING: I'm sorry; I'm looking at the
23 12th. I could do February 26, which would be two weeks later,
24 which would be approximately the same kind of time frame that
25 we were looking at between when we were already planning on

1 taking the deposition and the filing of our paper.

2 THE COURT: All right. And then how long is it going
3 to take you to get to your depositions after looking at their
4 declarations?

5 MR. SCHEINFELD: A week later.

6 THE COURT: In that week of the --

7 MR. SCHEINFELD: March 8th.

8 THE COURT: March 8th you would do your supplemental
9 papers, or you would be doing depositions?

10 MR. SCHEINFELD: Take the depositions of Google's --

11 THE COURT: All right. And then when would your
12 "supplemental paper," to adopt the term of art here, be?

13 MR. SCHEINFELD: March 24th.

14 THE COURT: March 24th. Now, there is a missing
15 person in this; that is me. I have to review these papers,
16 supplemental or not, and it takes me sometimes a little bit of
17 time to do that.

18 I will set it for April 14th at 2:00.

19 Now, you had some additional observations you wanted
20 to make regarding this matter?

21 MR. SCHEINFELD: The only question I would have is
22 whether or not you would hear live testimony on April 14, but
23 you made it clear at the last conference --

24 THE COURT: I do not intend to.

25 MR. SCHEINFELD: Okay. That's fine.

1 THE COURT: The parties can ask me to, or say that,
2 having reviewed their declarations they think live testimony is
3 appropriate, but I am going to focus on the declarations on the
4 14th. It may be that I will say I cannot fairly rule on the
5 Motion for Preliminary Injunction until I hear live testimony,
6 but the default here is the assumption that it is going to be
7 done on the papers.

8 MR. SCHEINFELD: Okay. That is fine, your Honor.

9 THE COURT: But is there anything else that you wanted
10 to observe for the record or for other purposes?

11 MR. SCHEINFELD: No. Other than to extend, again, my
12 apology, your Honor.

13 THE COURT: I am sorry. I did not mean to interrupt
14 you. The best apology is that we get this done in an orderly
15 fashion without this kind of gamesmanship. I intend to get to
16 the merits of the claims and have the opportunity for both
17 sides to have an opportunity to confront the persons who are
18 offering evidence against them.

19 Mr. Cloherty?

20 MR. CLOHERTY: Your Honor, I just want to join in the
21 apology, because I am responsible for that mistake, too.

22 THE COURT: I welcome anyone in the courtroom who
23 would like to apologize to me, but I welcome more than anything
24 else getting to the merits of this, and I think I have made
25 that clear.

1 So, now we have a new schedule here.

2 The next issue is this protective-order issue. Let me
3 say that I am allowing Google's Motion, No. 31, to Compel
4 Depositions, in accordance with the schedule that I have
5 established today.

6 Now, the joint motion with respect to Protective Order
7 and Ruling on Outstanding Issues, I guess there are several
8 things that I do not understand. Is there nobody in the Boston
9 area or, I guess, in New York City who reads Hebrew and can
10 translate it? What is the deal with sending documents in
11 Hebrew that nobody can read and then saying, Trust me? I do
12 not understand that. I do not understand it from the
13 defendant's point of view, that you cannot get a Hebrew
14 translator.

15 This kind of silliness -- Let me tell you, if you
16 think this has been an unpleasant experience, try some more of
17 this, and there will be less restraint shown with respect to
18 the posturing of the parties on this.

19 But enough of Hebrew.

20 MR. SCHEINFELD: Your Honor, may I be heard on the
21 protective order?

22 THE COURT: Yes. But let me tell you what I see is
23 the issues. I am told that the Google in-house counsel are
24 working on litigation. I would want a representation that they
25 were not involved in competitive decision-making in this area,

1 and I would want them to appear *pro hac vice*.

2 MS. BAKER MANNING: That's fine, your Honor.

3 THE COURT: Because I intend to have full control over
4 whoever it is who gets access to this information, and if it is
5 a lawyer and a lawyer who is directing clerical staff, I mean
6 that any violation of it will survive this case and become
7 contempt. That is my view with respect to it. I do not
8 understand why there was not some inclusion of lack of
9 involvement in competitive decision-making in this area.

10 MS. BAKER MANNING: They have never -- frankly, the
11 issue didn't come up until the reply papers, but the people
12 that we are interested in disclosing and having active in the
13 team are not competitive decision-makers. That is not an issue
14 at all, and we could certainly have them appear *pro hac vice*.

15 THE COURT: Now, let us turn to the question of the
16 Red Bend people. Are they actively involved in the litigation?
17 What are they doing?

18 MR. SCHEINFELD: Your Honor, Red Bend does not have
19 any in-house counsel.

20 THE COURT: That is not the question I asked. You
21 say, If they get three, we would like three too.

22 MR. SCHEINFELD: No. I'm sorry, your Honor.

23 There are different categories of confidential
24 information. The first category of confidential information is
25 confidential, and we did not object to Google's having three

1 in-house counsel see that information. We did object to
2 Google's having three in-house counsel for highly confidential
3 information.

4 Google has objected to have Iris Pappas, who is an
5 Israeli lawyer, counsel to Red Bend, see any kind of
6 confidential information. Is Iris Pappas a patent lawyer? No,
7 she is not, she is not a patent litigator, but she is counsel
8 to Red Bend, and she has provided and continues to provide
9 counsel to Red Bend. In terms of highly confidential
10 information, we thought it would be appropriate to be able to
11 use Iris Pappas as counsel, since we would not be able to
12 communicate --

13 THE COURT: What does that mean? I guess I need to
14 understand more fully what is involved here. I can understand
15 in-house counsel working to support the efforts of privately
16 retained counsel in the litigation of the case and providing
17 expertise that presumably in-house counsel would have, so long
18 as there is no -- or we minimize the dangers of competitive
19 mischief.

20 But I do not understand what Ms. Pappas adds to the
21 mix here, if she does not practice in the intellectual property
22 area.

23 MR. SCHEINFELD: She does practice in intellectual
24 property transactions, not litigation, your Honor.

25 THE COURT: What does she add to the mix? I guess I

1 just do not understand.

2 MR. SCHEINFELD: I would submit, your Honor, that what
3 she adds to the mix is what Google's in-house counsel adds.
4 They have an expertise regarding Google's business. Iris has
5 an expertise regarding Red Bend's business. She knows what Red
6 Bend's business is about. She's very close with the
7 management.

8 THE COURT: Well, is she involved in competitive
9 decision-making?

10 MR. SCHEINFELD: No, she is not, your Honor. In fact,
11 I was just in Israel the last few days, and I met with her on
12 Sunday, and we discussed this case. And she has signed a
13 declaration, your Honor, indicating what type of background she
14 has, that she is not involved in Red Bend's competitive
15 decision-making process. She also speaks about the ethics
16 rules in Israel as well submitting to the personal jurisdiction
17 of the court. But, your Honor --

18 THE COURT: Just a moment. How are they enforceable
19 here? What jurisdiction do I have over it? You will see that
20 I said that these three decision-makers or three in-house
21 counsel from Google had to be *pro hac vice*, and that is so that
22 I can capture their hearts and minds through their role here in
23 terms of officers of the Court.

24 Now, I have no reason to believe that there is any
25 material difference between the ethics requirements of

1 attorneys practicing in Israel than in the United States, but
2 the question of who gets to enforce a violation is a touchy
3 subject for me, and I do not know how I have jurisdiction over
4 Ms. Pappas if she violates that. I suppose I can take it out
5 on Red Bend, but that is not the way I ordinarily like to
6 proceed. I am more interested in making sure that the actual
7 malefactor is subject to sanction.

8 MR. SCHEINFELD: Your Honor, I am not an expert in
9 foreign judgments, but there is a Foreign Judgments Act of
10 1958, which seemingly would make judgments here enforceable
11 in --

12 THE COURT: What is the judgment? How do I have
13 jurisdiction over it? What do I do? I say I am going to have
14 a contempt proceeding, and she does not show up. Does that
15 mean that I can issue a judgment of contempt enforceable in the
16 Israeli courts? I do not know enough about that to be able to
17 say.

18 MR. SCHEINFELD: And nor do I, your Honor, on that
19 point. I do not want to belabor this point anymore. We will
20 survive without Iris Pappas seeing highly confidential
21 information. So, I am not sure at this point, given where we
22 are, given that we should move along to the merits, that it is
23 necessary that we spend more time arguing over this point.

24 THE COURT: Well, what I am prepared to do is enter an
25 order that includes I believe it is paragraph 10b, with an

1 amendment that includes requirements that each of the counsel
2 subject themselves to the jurisdiction of the Court by
3 appearing *pro hac vice*, and that there be a representation that
4 they are not involved in competitive decision-making.

5 Now, with respect to Red Bend, I am prepared to
6 consider something on a parity kind of basis, but I have to be
7 satisfied that I am going to have control over persons who are
8 going to receive this information. Here, I have got two
9 factors that are in play. Number one, apart from long-term
10 relationship with Ms. Pappas and the company and involvement,
11 to some degree, in intellectual property matters but not in
12 litigation, I am not sure that there is any way that I have a
13 measure of enforcement over her compliance with the order. If
14 I can be persuaded otherwise, I will consider a further
15 amendment to the Protective Order to deal with that.

16 Second, with respect to specific matters, which, if
17 counsel sees them and says, We need the assistance of someone
18 in-house here by way of an attorney, I will look at that as a
19 further order with respect to the Protective Order. But to put
20 the Protective Order in place now, I may adopt the 10b, that
21 is, the Google proposal with the two amendments that I have
22 added. I will expect to have submitted to me by this afternoon
23 a clean copy of this for me to sign.

24 MR. SCHEINFELD: One supplemental point, your Honor.
25 On the confidential level, each side is allowing, I believe,

1 two business people to see the confidential information of the
2 other side. I would like to raise that to three business
3 people, your Honor, on the confidential level, because we do
4 not have --

5 THE COURT: Point me to the paragraph.

6 MS. BAKER MANNING: I believe it's 6.

7 THE COURT: 6h?

8 MS. BAKER MANNING: I believe it's 6c that
9 Mr. Scheinfeld is referring to.

10 MR. SCHEINFELD: 6c, your Honor.

11 THE COURT: Okay.

12 MR. SCHEINFELD: Considering that we do not have
13 in-house counsel, we thought it would be appropriate and fair.

14 THE COURT: Any objection to that?

15 MS. BAKER MANNING: No, your Honor.

16 THE COURT: All right. So, you will submit a modified
17 version that changes 6c to provide up to three employees of a
18 party who either have responsibility for making decisions, that
19 is the language of 6c, and 10b with the modifications that I
20 have indicated here and the further *provisos* that I have
21 indicated. And I am, correspondingly, not making a change to
22 10i -- or introducing 10i.

23 Now, is there anything else?

24 MS. BAKER MANNING: Not from Google, sir.

25 MR. SCHEINFELD: Not from Red Bend, your Honor.

1 THE COURT: Okay. So, I think I have, perhaps, made
2 myself clearer than I was before. I intend to deal with this
3 on the merits, but on the merits the parties have to have an
4 opportunity to confront in a reasonable time frame those who
5 are offering evidence against them. So, the depositions are, I
6 think, absolutely necessary, and we take the time to get it
7 right.

8 MR. SCHEINFELD: I appreciate that, your Honor.

9 MS. BAKER MANNING: Thank you, sir.

10 THE COURT: We will be in recess.

11 THE CLERK: All rise.

12 (The Honorable Court exited the courtroom at 11:30 a.m.)

13 (WHEREUPON, the proceedings adjourned at 11:30 a.m.)

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I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *Red Bend Software, Inc., et al v Google, Inc.*, No. 1:09-cv-11813-DPW.

Date: February 1, 2010

/s/ Brenda K. Hancock

Brenda K. Hancock, RMR, CRR

Official Court Reporter