

I. INTRODUCTION

1. I am a partner with Berdon LLP ("Berdon"), a full service accounting and consulting firm headquartered in New York City. I am Co-Director of the Litigation and Business Valuation Group and practice in the area of business valuation and damage analysis. My curriculum vitae is attached as Exhibit 1 (including a summary of recent testimony and publications).

2. I have been retained by the law firm of Baker Botts LLP, on behalf of the plaintiffs. I have been asked to provide, among other things, an opinion regarding the likelihood of irreparable harm to Red Bend, Ltd. and/or Red Bend Software Inc. (the "Plaintiffs") resulting from the infringement by Google Inc. (the "Defendant") of United States Patent No. 6,546,552 (the "552 Patent" or the "Subject Patent") in connection with their continued use and distribution of the technology embodied in the Subject Patent. In addition, I have also been asked to provide an opinion with regards to the declaration of Mr. W. Christopher Bakewell, dated March 1, 2010 (the "Bakewell Declaration").

3. I have been asked to assume that the Subject Patent is both valid and enforceable, and that Defendant is directly and indirectly infringing on the Subject Patent through its use and open source distribution of its "Courgette" software. I have not formed an independent opinion regarding validity, enforceability or infringement.

II. BACKGROUND

4. Plaintiffs previously developed a highly-efficient technique for updating software programs over a communication network. It is my understanding that this technique allows for software and firmware to be updated more easily and quickly than previous methods, and also utilizes less capacity on the relevant communication network¹. Red Bend Ltd. applied for a patent on this technique and was awarded the Subject Patent in 2003. Red Bend Software Inc. is the exclusive licensee of the patent, with rights to sub-license².

5. Plaintiffs have developed and widely distributed software using techniques included within the Subject Patent. For example, Red Bend's software has been deployed in more than 620 million mobile devices and adopted by eight of the top 10 handset manufacturers, including Kyocera, LG Electronics, Motorola, Sharp, Sony Ericsson and ZTE, as well as dozens of other leading companies in the mobile, machine to machine ("M2M") and WiMAX markets³. Red Bend software is also utilized in personal computer ("PC") Internet-based updating.

6. Plaintiffs' software efficiently updates firmware and/or software installed on various connected devices. Plaintiffs distribute their software to customers through software licenses. Plaintiffs market their software under a variety of names, including "vRapid Mobile[®]," "vCurrent Mobile," and "vDirect Mobile[™]."⁴ It is my understanding that vCurrentMobile was used for the updating of firmware, while vRapid Mobile[®] was used for the updating of software. I understand that vDirect Mobile[™] is used primarily for device management. It is my understanding that vCurrent Mobile and vRapid Mobile[®] were recently integrated into one

¹ Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction Enjoining Google's Infringement, p1-4.

² RedBend 10952-10956.

³ <http://www.redbend.com/pdf/CorporateProfile.pdf>

⁴ Ibid.

Confidential - Attorney's Eyes Only

product under the vRapidMobile[®] name; this product therefore provides both firmware and software updating in one package. Finally, it is my understanding that the vCurrent Mobile and vRapid Mobile[®] products practice the technology embodied in the Subject Patent.

7. Plaintiffs were founded in 1999. As of December 31, 2008, Plaintiffs had assets of approximately \$13.2 million and revenues of approximately \$15.8 million. Plaintiffs are privately held and have offices in China, Israel, Japan, Korea, the United Kingdom and the United States⁵.

8. Defendant is a “global technology leader focused on improving the ways people connect with information.”⁶ Defendant also maintains a large index of web sites and other online content. This content is made freely available via Defendant’s search engine. Defendant’s automated search technology helps users to obtain instant access to relevant information from its online index. Defendant provides targeted advertising and Internet search solutions, as well as hosted applications. Defendant primarily derives its revenue from targeted advertising. Further, Defendant provides a connected device software platform, named “Android.” Defendant is aggressively expanding on its technological reach – in late 2008 it launched its Chrome Internet browser and very shortly will be launching its Chrome operating system.

9. Defendant was founded in 1998 and is headquartered in Mountain View, California. Defendant is a publicly held company (NASDAQ Ticker: “GOOG”) with total assets

⁵ Ibid.

⁶ Google Inc, Form 10-K (Fiscal Year ended December 31, 2009).

Confidential - Attorney's Eyes Only

of approximately \$40.5 billion, total revenues of approximately \$23.7 billion and a market capitalization of \$175 billion (7th largest United States company) as of December 31, 2009⁷.

10. Defendant released software named Courgette in July 2009⁸. Courgette is primarily used to efficiently update software. It is my understanding and assumption that Courgette uses methods that infringe on the Subject Patent. Not only is Defendant directly infringing the Subject Patent by using Courgette to update its current Internet browser, "Chrome," but it is also indirectly infringing the Subject Patent by distributing Courgette free of charge (i.e., "open sourcing").

⁷ <http://finance.yahoo.com/q/ks?s=GOOG> and http://www.theonlineinvestor.com/large_caps/

⁸ <http://blog.chromium.org/2009/07/smaller-is-faster-and-safer-too.html> (GOOG-00026259)

III. BAKEWELL DECLARATION

11. W. Christopher Bakewell provided a declaration dated March 1, 2010. This declaration primarily discusses Mr. Bakewell's opinions with regards to the irreparable harm that would be incurred by Plaintiffs with Defendant's continued use and distribution of the Courgette software. For many reasons discussed below, many of Mr. Bakewell's statements and concluded opinions are flawed and, in some instances, simply incorrect based upon the facts and evidence produced to date.

12. Mr. Bakewell states "I understand that, as a matter of law, the availability of monetary damages precludes a finding of irreparable injury, and thus precludes issuance of a preliminary injunction."⁹ My understanding is that Mr. Bakewell is fundamentally incorrect. Thus, his analysis and conclusions stemming from such a flawed foundational premise would very likely be wrong.

13. It is my understanding that the mere availability of monetary damages does not preclude a finding of irreparable harm. Economic damages in a patent infringement matter are determined pursuant to 35 U.S.C. § 284 which sets forth that "Upon finding for the claimant, the Court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the Court." Thus, it is my understanding that a claimant is entitled to damages adequate to compensate for the infringement.¹⁰ It is further my understanding that the essential attribute of a patent grant is that it provides the patentee with the statutory right to exclude competitors from infringing its patent. In view of such right,

⁹ Bakewell Declaration, ¶15.

¹⁰ General Motors Corporation v. Devex Corporation, 461 U.S. 648, 103 S. Ct. 2058.

Confidential - Attorney's Eyes Only

infringement may cause a patentee irreparable harm not adequately remediable by a reasonable monetary payment, i.e., monetary damages will not always suffice to make a patentee whole.¹¹

14. Therefore, it is my understanding that irreparable harm is incurred when Plaintiffs cannot be adequately compensated in the form of monetary damages¹². Typically irreparable harm occurs when (1) it is unlikely that Defendant has adequate resources to compensate damages, or (2) it is unlikely that all aspects of damages incurred by Plaintiffs can be sufficiently quantified. Here, the second aspect drives the determination of the likelihood of irreparable harm.

15. While I have yet to perform a complete damages study and model for this case at such an early stage, it is clear that Plaintiffs will likely suffer damages in several aspects, including: (1) loss of royalty revenues from infringers, (2) loss of license revenues through loss of current and future customers, (3) loss of market opportunities, (4) loss of reputation, and (5) loss of goodwill.

16. Without the ability to first identify all the subsets of damages stemming from Defendant's actions within the entire damages universe and then provide proven reliable methodologies to quantify each identified component of such damages to a reasonable certainty, (which is the case here), a plaintiff cannot be made fully whole by a monetary damages amount.

¹¹ Acumed LLC v. Stryker Corporation, 551 F. 3d 1323, Hybritech Incorporated v. Abbott Laboratories, 849 F. 2d 1446, Reebok International LTD. v. J. Baker, Inc., 32 F. 3d 1552, Eli Lilly and Company v. Teva Pharmaceuticals USA, Inc., 609 F. Supp.2d 786.

¹² This definition of irreparable harm is consistent with case law. For example, see K-Mart Corporation v. Oriental Plaza, Inc. 875 F.2d 907 whereby the Court stated that "the necessary concomitant of irreparable harm is the inadequacy of traditional legal remedies. The two are flip sides of the same coin: if money damages will fully alleviate harm, then the harm cannot be said to be irreparable". Thus implying that irreparable harm exists when money damages will not fully alleviate harm.

Confidential - Attorney's Eyes Only

As a result, a plaintiff would incur irreparable harm. Such factors exist in this case, and therefore, there is a likelihood of irreparable harm to Plaintiffs¹³.

17. Furthermore, Mr. Bakewell's premise that the availability of monetary damages precludes a finding of irreparable harm is further flawed because he fails to understand that monetary damages are not the universal antidote that would, de facto, preclude a finding of irreparable harm. It is my understanding that when the threat of potential economic loss is so great as to threaten the viability or existence of a plaintiff's business, then such threat, in and of itself, is a factor that would lead a Court to find irreparable harm.¹⁴ Mr. Bakewell did not fully appreciate the framework of Plaintiffs' business and thus his opinion is handicapped therefrom. The subject technology and products incorporating such are the "key" to its entire business platform. [REDACTED] and given the interrelationship between all of its principal products and its customer base, coupled with the realities of its fixed overhead base and funding sources, the Plaintiffs' business is unlikely sustainable upon even a loss of a significant portion of its vRapid Mobile® product line. Consequently, the aforementioned must be incorporated into the analysis of the character of potential damages and resultant irreparable harm. I found Mr. Bakewell's analysis lacking any consideration of this real business dynamic.

¹³ The Courts have found that if irreparable injury is "likely", then preliminary relief is appropriate. See Donald C. Winter v. Natural Resources Defense Council Inc., et al., 129 S. Ct. 365 whereby the Court stated "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."

¹⁴ Frank Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, Vaqueria Tres Monjitas, Inc.; Suiza Dairy, Inc. v. Cyndia E. Irizarry, et al, 587 F. 3d 464

[REDACTED]

Confidential - Attorney's Eyes Only

18. Mr. Bakewell states that “While this dispute is at an early stage, my preliminary review of the [Georgia-Pacific] factors indicates that information probative to a reasonable royalty exists for each [Georgia-Pacific] factor.”¹⁶ It is unclear as to how Mr. Bakewell’s statement negates irreparable harm. First, it is my understanding, that before a damage expert can fashion a means or technique for quantifying the damages in a particular setting, he must first define all of the elements or components of such damages. Mr. Bakewell fails to do this, and thus, his suggested solution is inadequate in scope. Merely because information regarding the Georgia-Pacific factors is available or anticipated to be available for just a component of the damages is nondeterminative.

19. In fact, Mr. Bakewell’s inability to specifically identify the full spectrum of the damages triggered by Defendant’s behavior, including lost “window of opportunity”, among others, proves the reality that in this situation there is clearly the likelihood of irreparable harm. The fundamental factor that Mr. Bakewell appears to ignore is that merely because a reasonable royalty rate may be determined does not automatically presume that such a royalty will adequately compensate Plaintiffs for the full spectrum of their damages.

20. Mr. Bakewell’s Georgia-Pacific methodological solution to quantify the damages may, at best, derive a royalty rate; but this method also requires a proper base to which to apply such rate. In his deposition, Mr. Bakewell indicated that his Georgia-Pacific analysis may be able to avoid quantifying a base of lost revenues by fashioning a lump sum (upfront) royalty amount¹⁷. I do not understand how the use of a lump sum royalty amount eliminates the need to

¹⁶ Bakewell Declaration, ¶17.

¹⁷ Deposition of Mr. W. Christopher Bakewell, p117-118.

Confidential - Attorney's Eyes Only

quantify a base as such lump sum is typically computed based on implicitly estimating an expected base to which a reasonable royalty rate is applied.

21. Furthermore, Mr. Bakewell fails to consider damages that cannot be quantified under the Georgia-Pacific methodological solution and thus his resultant conclusion is based on an incomplete analysis and likely erroneous. It is my opinion that one such omitted damage category overlooked by Mr. Bakewell is that resulting from a missed window of opportunity. It is my understanding that Red Bend is a potential near-term initial public offering (“IPO”) candidate¹⁸. My some 20 years experience as a mergers and acquisitions (“M&A”) consultant allows me to fully appreciate the intricacies and dynamics associated with “going public.” Although the success of a potential near term IPO occurring is always uncertain given the vagaries of both the marketplace and a candidate’s continuing favorable financial performance, timing is most certainly a key triggering factor. Any misstep causing a candidate to not quickly seize the window of opportunity for its type of company to go public, may be an opportunity lost forever. I was surprised that, given Plaintiffs’ ownership character, history, profit history and trending upswing, industry dynamics, and industry IPO buzz identifying Red Bend as only one of a handful of potential near term IPO candidates in the mobile space, that Mr. Bakewell’s analysis completely omitted any mention or consideration of this factor in the irreparable harm equation. A proper analysis leading to a supportable opinion must address the entire spectrum of types of damages, even if they do not fall neatly into the Georgia-Pacific methodology.

¹⁸ 451 TDM Tech Dealmaker, 2010 M&A Outlook – Mobility, December 17, 2009.

Confidential - Attorney's Eyes Only

22. In regard to Mr. Bakewell's Georgia-Pacific methodology, the inability to reasonably determine the proper royalty base is in essence the central issue with irreparable harm in this matter.¹⁹ In addition, while a reasonable royalty may compensate Plaintiffs for a portion of their damages, i.e., lost royalty revenues, it may not compensate Plaintiffs for other aspects of damages, i.e., loss of reputation, loss of goodwill, loss of future opportunities, loss of strategic position, etc. As stated previously, if these other aspects of damages cannot be adequately quantified, then there exists a likelihood of irreparable harm, which is the case here.

23. Mr. Bakewell states that "Mr. Salinger testified that he has no understanding of how damages are calculated in a patent case. However, he agreed that Red Bend could be compensated monetarily."²⁰ First of all, Mr. Salinger is not a damages expert, nor is he expected to know damages concepts and theories of loss. Second, Mr. Bakewell misses Mr. Salinger's response on the next page, when he states the following regarding the difficulty that Plaintiffs will have in quantifying all aspects of their damages:

Question: The last clause of that is: "Red Bend will therefore have no meaningful mechanism to determine the extent of damages as a result of that infringement." Can you tell me the complete basis you had for that statement as of the date that you signed your declaration?

Mr. Salinger: Again, I think I stated earlier that putting Courgette on open source, which calls -- putting Courgette on open source, calling others to take usage of that, not just by themselves, but making it available on, for example, Moblin foundation or Fedora foundation creates a situation where it's going to be very hard for us to -- it's going to be very hard for us to determine the extent of the damages.²¹

¹⁹ Through Defendant's open-sourcing arrangement whereby it is freely distributing the infringing software to unknown users, it is impossible to determine all the infringing users of such software. Also, see paragraph 25 below.

²⁰ Bakewell Declaration, ¶19.

²¹ Deposition of Mr. Yoram Salinger, pp239-240.

Confidential - Attorney's Eyes Only

In addition, Mr. Bakewell missed Mr. Salinger's earlier response whereby he stated:

Mr. Salinger: I think that putting Courgette in open source and offering it to the public to use free without need for license, without us being able to track who is downloading it and for what usage is harming us in a severe way. And on top of it, I think from reading what Google published on that and from comments made very soon after Google had published it, it suggests that what we have been known for and successful for, has actually not been developed by us but has been developed by Google; and, therefore, in the time I signed that I was -- I was concerned that we are severely being harmed by that act of Google.²²

24. Mr. Bakewell states that "I understand Red Bend has offered no evidence in support of the preliminary injunction motion that any third party has directly infringed the '552 patent, and particularly no evidence of a competing third-party product that embodies the claims of the '552 patent."²³ However, such evidence is available, and therefore, Mr. Bakewell should change his outlook regarding this factor and consequently his overall opinion. In fact, there is evidence that Courgette is available on several websites.²⁴ It is certainly common sense as well as common business practice that this trend can be expected to continue without the preliminary injunction, which in all likelihood will lead to irreparable harm to Plaintiffs.

25. Mr. Bakewell goes on further to state "I further understand it is the plaintiff's burden to prove and measure indirect infringement. This may be accomplished via surveys, market studies, expert research and through the discovery process."²⁵ However, the point that Mr. Bakewell misses is that this case and the factors surrounding it are atypical in the sense that if, for example, Defendant continues to provide Courgette via open source, there is no feasible way

²² Ibid, pp213-214.

²³ Bakewell Declaration, ¶21.

²⁴ It is my understanding that Courgette has been discovered on the following websites: www.fedora.org, www.moblin.org, www.freebsd.org, www.gentoo.org, www.splayer.org, www.archlinux.org, www.opensuse.org. It is also my understanding that infringing software use was evident on the www.splayer.org and www.cedarandthistle.wordpress.com websites.

²⁵ Bakewell Declaration, ¶21.

Confidential - Attorney's Eyes Only

to track all parties who are downloading the infringing software, and therefore, have the potential to be current or future infringers. Defendant openly admits this via their counsel in a letter dated December 22, 2009 whereby counsel states "I write to advise you that Google does not have documents in its possession, custody, or control sufficient to show the number of times the Courgette source code was accessed or downloaded by a non-partyGoogle does not track such information in the normal course of business."²⁶ [REDACTED]

[REDACTED]

[REDACTED] Therefore, with no feasible way to track these potential infringers, Plaintiffs are losing control of their patented technology and there may be no way to fully determine the damages due to Plaintiffs. Consequently, there is a high likelihood of irreparable harm to Plaintiffs. This situation closely parallels where someone unleashes a virus unto the population at large and there is no means to currently identify the recipients of said virus or ascertain the extent of the infection and consequences of such that they may suffer. Fashioning a reliable recuperative solution to such an event becomes more and more tenuous as time elapses, which can be analogized to irreparable harm. The only reasonable action to take is to immediately halt the continuing dissemination of the virus, which can be analogized to a preliminary injunction. Applying Mr. Bakewell's logic to this example would translate to "even though we presently do not understand the epidemiology of this virus, there is no need to worry at this time, we will find some way to deal with the effects of the infection sometime in the

²⁶ Letter dated December 22, 2009 from Ms. Susan Baker Manning of Bingham McCutchen LLP to Mr. Eliot Williams of Baker Botts LLP.

[REDACTED]

Confidential - Attorney's Eyes Only

future.” Equating “open source” to a virus that has the effect of eroding intellectual property rights is quite on point in this setting.²⁸

26. Mr. Bakewell states that Mr. Salinger “could not identify any specific harm suffered by Red Bend.”²⁹ However, Mr. Bakewell apparently misses sections of Mr. Salinger’s deposition whereby he does identify specific harm suffered by Plaintiffs.³⁰

27. Mr. Bakewell states that it is his understanding that “in a matter involving a preliminary injunction, lost market share must be proven (or at least substantiated with some evidence) to support entry of a preliminary injunction.”³¹ Once again, I believe that Mr. Bakewell’s understanding is incorrect. It is my understanding that the standard for a preliminary injunction is that there needs to exist a likelihood of irreparable harm (of which lost market share is only one component); one does not need to prove irreparable harm.³² Such a standard meets common sense, as irreparable harm may take time to develop upon the plaintiff (as is the case here). Therefore, if one had to wait until proof of irreparable harm could be provided before one could prevent it with a preliminary injunction, the plaintiff would surely incur irreparable harm. Here, such likelihood of irreparable harm clearly exists.

28. Mr. Bakewell states that “there is no indication that Google’s Courgette product competes with Red Bend’s products.”³³ Such a statement indicates that Mr. Bakewell is viewing these markets with a very narrow and, in my opinion, incorrect focus. Again, it is my opinion

²⁸ “Penalties for Microsoft Argued, Nine States Seeking Changes that Could Benefit Competitors”, Richmond Times Express – Business, December 8, 2001.

²⁹ Bakewell Declaration, ¶23.

³⁰ See, for example, Salinger Deposition, pp218-220, pp 223-226.

³¹ Bakewell Declaration, ¶25.

³² In fact, Mr. Bakewell appears to have a dismissive bias with regards to the potential for irreparable harm under any circumstances. For example, on p123 of Bakewell Deposition, when asked “Could you give me some examples of situations where, in your mind, there would be a likelihood ...[of] irreparable injury”, Mr. Bakewell responds “...I can’t think of any concrete examples.”

³³ Bakewell Deposition, ¶26.

Confidential - Attorney's Eyes Only

that Defendant and Plaintiffs operate in the same markets because the cellular, wireless Internet, and Internet markets are currently in a stage of convergence that is only expected to continue. For example, Defendant was quoted as stating that "in three years or so desktops will give way to mobile as the primary screen from which most people will consume information and entertainment." Defendant's sales chief, Mr. John Herlihy, went even further to state that "[i]n three years time, desktops will be irrelevant. In Japan, most research is done today on smart phones, not PCs."³⁴ Defendant's CEO, Mr. Eric Schmidt, stated at the recent GSM Association Mobile World Congress that everything that Google will do going forward will be via a mobile lens, centring on the cloud, computing and connectivity³⁵. Mr. Salinger confirmed these same thoughts in his deposition:

Question: Okay. And that makes the laptop part of the mobile phone market, in your view?

Salinger: Again, I think there is a very, a very -- I think that the distinction between Internet and mobile is something that is becoming less and less relevant, if at all.

Question: Are there any distinctions, in your view, between — Well, you said Internet and mobile?

Salinger: There is -- there is a distinct, by method of connectivity, but I think all of the discussed types of devices are being connected to the Internet one way or the other. And at least some of them are being connected in a dual way. In a dual way. You will see cell phones that have WiFi connection as well as cellular connection, so what are they? Internet devices, mobile devices, all of the above?

Question: Well, what's your view?

Salinger: All of the above.³⁶

³⁴ <http://www.siliconrepublic.com/news/article/15446/business/in-three-years-desktops-will-be-irrelevant-google-sales-chief>

³⁵ Ibid.

³⁶ Salinger Deposition, p258.

* * * *

Question: Do you think the [internet and mobile] markets have already converged, or they are in the process of converging, or you expect them to converge?

Salinger: I think they have converged³⁷.

In addition, Mr. Bakewell acknowledged during his deposition that he was aware of this convergence trend³⁸. However, I note that Mr. Bakewell fails to mention this trend or concept even once in his declaration. This is particularly surprising given that the convergence trend in the “connected device” space is replete with this current and on-going market dynamic. It is my opinion that a supportable and thorough analysis leading to a conclusion of irreparable harm must especially consider this important factor.

29. Therefore, Plaintiffs and Defendant operate in the same market and would be considered head-to-head competitors versus supplier-customer. Such a distinction is essential in this matter, as Defendant's improper use of the technology embodied in the Subject Patent will, in all likelihood, cause Plaintiffs to lose customers and lose market share. It is very possible that such losses will be unquantifiable. In which case, such losses will lead to irreparable harm to Plaintiffs.

30. Defendant's open source tactic would also inflict damage to Plaintiffs' ability to exploit this convergence in the future market due to its current technological and operational platform, namely its goodwill, reputation and strategic position. A technology based company develops such intangible value through the course of its development – starting from its initial start-up phase, continuing through its emerging company phase where it is still generating both

³⁷ Ibid, p259.

³⁸ Bakewell Deposition, p194.

Confidential - Attorney's Eyes Only


operating losses and deficiency in its expected return on its owner's investment as it exploits its technology, continuing into its final going concern stage/goodwill stage. This economic journey, if successful, earns it the intangible foundation and positioning to successfully engage the evolving or changing market. Plaintiffs have successfully charted through this path and earned the reputation, goodwill and intangible and operational wherewithal to reap its share of the economic pie in the future. With Defendant inflicting widespread and undeterminable injury to the intangible foundation of Plaintiffs via open source distribution of Courgette, Plaintiffs' economic platform from which it operates will sustain harm that is not expected to be reasonably determinative today as the evolving tech markets expectedly converge and reformulate in the future.

31. Mr. Bakewell states that "None of Red Bend's customers use Red Bend's technology to deliver updates to software or firmware running on their end user's laptops or desktops."³⁹ However, Mr. Bakewell does note in the footnote "other than ICQ," which was software used on laptops and desktops and for which Plaintiffs supplied a software solution using the Subject Patent. Regardless, Mr. Bakewell needs to recognize that Plaintiffs' technology could be used for updating laptops and desktops, particularly in converging markets. The concept of irreparable harm encompasses the fact that due to the Defendant's actions, Plaintiffs will probably be deprived an economic opportunity in the future owed them due to their current strategic, operational and technological position. Mr. Bakewell either fails to grasp this concept or is unable to provide an acceptable damage construct to permit its quantification. In either case, his opinion is fatally flawed.

³⁹ Bakewell Declaration, ¶28.

Confidential - Attorney's Eyes Only

32. In furtherance of Mr. Bakewell's improper belief that Plaintiffs and Defendant are of a customer-supplier relationship versus a head-to-head competitor relationship, Mr. Bakewell



33. Mr. Bakewell states that "[i]n the evidence I have reviewed, I have seen no evidence supporting Red Bend's claim that licenses (sic) are likely to cease payment of royalties."⁴³ However, what Mr. Bakewell apparently has not assessed is the likelihood that Plaintiffs' licensees will cease payment of royalties; whether or not it has happened to date is not determinative when there is a likelihood that such customer defections or reduced revenues will happen in the future. Thus, Mr. Bakewell's analysis addresses an incorrect premise: current situation versus likely behavior. Given that (1) Courgette can be very easily adapted to update software and firmware on a mobile network,⁴⁴ (2) Defendant is freely distributing the Courgette software, and (3) Defendant is highly marketing such software through blogs and releases, it is


⁴⁰ Ibid, ¶31.

⁴¹ Ibid.



⁴³ Bakewell Declaration, ¶34.

⁴⁴ See, for example, Declaration of Stephen A. Edwards, p7, ¶24 whereby Dr. Edwards states that "[Courgette] is written such that it is easily adaptable to processing executable files for other platforms, such as those found in mobile devices."



Confidential - Attorney's Eyes Only

highly likely that software developers or even Plaintiffs' current customers will adapt Courgette to the needs of Plaintiffs' customers (or themselves), and therefore, Plaintiffs will experience loss of current and future customers. In these "lean" times, it is not difficult to foresee that if a particular customer can achieve the same results using free software versus that obtained by paying a license fee to a third-party, customers will opt for the former. Mr. Bakewell cannot convincingly argue against one of the central tenets of the capitalistic system – profit optimization through cost minimization.

34. Mr. Bakewell states that "Mr. Salinger could not identify the likelihood, if any, that Red Bend's current licensees would cease payment or refrain from purchasing further licenses."⁴⁵ However, Mr. Bakewell would have to concede that Mr. Salinger stated that it was likely that this would occur⁴⁶. In addition, with regards to future licenses, and when asked "how likely is it in your opinion that Red Bend's ability to enter into future licenses will be adversely affected?" Mr. Salinger responds, "very likely."⁴⁷

35. In his summary, Mr. Bakewell states that "I have seen no evidence supporting Red Bend's claim that it is likely to lose customers or revenues as a result of Google's alleged infringement."⁴⁸ However, what is not clear is what Mr. Bakewell has done to determine if such likelihood exists, which I understand to be the standard required for a preliminary injunction. In addition, Mr. Bakewell states that this conclusion is consistent with the "fact that Courgette does not compete with any Red Bend product"⁴⁹ and that "Courgette is not used to create over-the-air

⁴⁵ Bakewell Declaration, ¶35.

⁴⁶ Salinger Deposition, p221-222

⁴⁷ Ibid, p227

⁴⁸ Bakewell Declaration, ¶41.

⁴⁹ Ibid.

Confidential - Attorney's Eyes Only

updates for applications.”⁵⁰ As discussed previously, and as discussed below in greater detail, Defendant and Plaintiffs are competitors in this converging market and I understand Courgette can be very easily adapted to create over-the-air updates for applications. Therefore, because Mr. Bakewell's two fundamental underpinnings are incorrect, his conclusion is fundamentally flawed and without probative value in my view.

36. Therefore, it is my opinion that Plaintiffs will suffer irreparable harm through Defendant's direct use of the Subject Patent and further through its unbridled “open source” distribution of such technology. Such irreparable harm will be caused by the potential for the complete demise of Plaintiffs' business prior to the conclusion of this litigation action in addition to the likely inability to fully quantify all aspects of damages, namely the loss of royalty revenues, the loss of current and future customers (i.e., unquantifiable loss of market share), irreversible price erosion, the loss of market opportunities (including loss of window of opportunity), the loss of goodwill, and the loss of reputation.

⁵⁰ Ibid.

IV. KORN OPINION

A. Summary of Opinion

37. For reasons discussed below, it is my opinion that it is very likely that Plaintiffs will suffer irreparable harm if a preliminary injunction is not promptly issued. Such irreparable harm will be the result of, at a minimum, the loss of royalty revenues, the loss of current and future customers, the loss of future market opportunities, the loss of reputation, and an overall loss of goodwill.

B. Definition of Irreparable Harm

38. Again, it is my understanding that irreparable harm is incurred when Plaintiffs cannot be adequately compensated in the form of monetary damages⁵¹.

39. While I have yet to perform a complete damages study and model for this case at such an early stage, it is clear that Plaintiffs will probably suffer damages in several aspects, including: (1) loss of royalty revenues from infringers, (2) loss of license revenues through loss of current and future customers, (3) loss of market opportunities, (4) loss of reputation, and (5) loss of goodwill. As will be discussed below in greater detail, while it is foreseeable that some of these aspects of damages may be determinable to a reasonable certainty, others will not; therefore, because it is likely that all aspects of damages will not be sufficiently quantifiable, it is likely that Plaintiffs will be expected to incur irreparable harm.

C. Aspect of Damages: Loss of Royalty Revenues from Infringers

40. It is clear that one of the most obvious damages aspects is the loss of royalty revenue due from the Defendant infringer's direct infringement and indirect infringement of the Subject Patent. Damages of this nature are typically determined by an assessment of the "15 factors" as

⁵¹ See additional discussion in paragraphs 13 to 15.

Confidential - Attorney's Eyes Only

stated in the well-known Georgia-Pacific case⁵², which leads to an ultimate conclusion of a reasonable royalty rate. Such royalty rate is then applied to a proper revenue base to produce a reasonable royalty owed to Plaintiffs.

41. In this case, at this stage, I do not see a reason why such an assessment will not lead to a proper conclusion of a reasonable royalty rate which could be applied to a royalty base of perhaps usage, if determinable, or Plaintiffs' revenues. However, given the nature of Defendant's business model, and given the fact that they provide all of their "content" for free and generate revenues primarily from sales of targeted advertising, it may be difficult to determine a proper royalty base derived from revenues. In addition, and as discussed previously,⁵³ because it is nearly impossible to identify who is downloading and using Courgette from Defendant's open-source site, it may be virtually impossible to identify the entire usage of Courgette and therefore determine a proper royalty base that is derived from "usage". If such analysis cannot adequately compensate Plaintiffs for damages, then Defendant's continued direct and indirect infringement of the Subject Patent will cause irreparable harm to Plaintiffs.

42. In addition, I must take into account that the Subject Patent gives Plaintiffs the "right to exclude" who uses the Subject Patent and for what purpose. It is my understanding that "the principal value of a patent is its statutory right to exclude"⁵⁴ and that "the nature of the patent grant weighs against holding that monetary damages will always suffice to make patentee whole."⁵⁵ "If monetary relief were the sole relief afforded by the patent statute then injunctions would be unnecessary and infringers could become compulsory licensees for as long as the

⁵² Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp 1116 (S.D.N.Y. 1970).

⁵³ See paragraph 24.

⁵⁴ Hybritech Incorporated v. Abbott Laboratories, 849 F. 2d 1446.

⁵⁵ Ibid.

litigation lasts.”⁵⁶ In this case, and given that Defendant and Plaintiffs are head-to-head competitors, Plaintiffs would not have licensed the Subject Patent to Defendant in the manner associated with the subject infringement.

It is my understanding that when such likelihood exists, so does a likelihood of “irreparable harm.”

D. Aspect of Damages: Loss of Revenues through Loss of Current and Future Customers Relating to Existing Products and Services

43. This aspect of damages focuses on the reasonably high likelihood that Plaintiffs’ current customers will eventually (1) obtain the Courgette software (for free), (2) modify the software such that it can mimic the abilities of Plaintiffs software, and (3) cease the license agreement with Plaintiffs,⁵⁷ and/or cause Plaintiff to downwardly adjust its pricing (price erosion). One must also consider that Plaintiffs can lose unknown potential customers for its existing products and services via the same process. This combination will result in an unquantifiable loss of market share.

⁵⁶ Ibid.

⁵⁷ Mr. Salinger also indicates this as a source of harm in his deposition, p202, lines 19-25.

44. Ultimately, such factors will cause Plaintiffs to lose revenues by way of lost software license fees. [REDACTED]

[REDACTED] While the lost revenues from current customers may be quantifiable in the form of damages, it is unlikely that one will be able to quantify the lost revenues from potential or future customers for existing products and services with reasonable certainty. Therefore, because it is likely that neither I, nor any other damages expert will be able to determine the full impact of this aspect of damages with reasonable certainty, it is equally likely that Plaintiffs will not be fully compensated for this aspect of damages, and therefore, irreparable harm will occur.

E. Aspect of Damages: Loss of Market Opportunities

46. The damages aspect discussed above is concerning Plaintiffs loss of market share and future revenues given its existing product offerings. However, there is also the concern that, given Defendant's actions, Plaintiffs will not be able to pursue new opportunities in the market,

⁵⁸ See footnote 15.

⁵⁹ Frank Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, Vaqueria Tres Monjitas, Inc.; Suiza Dairy, Inc. v. Cyndia E. Irizarry, et al. 587 F. 3d 464

Confidential - Attorney's Eyes Only

both from an operational as well as financial perspective, as the dynamic marketplace keeps shifting.

47. From an operational perspective, one must realize that this is not a typical head-to-head competitor infringement case. Defendant, who is a highly respected, well-followed company with a market capitalization of approximately \$175 billion (7th largest in the United States) is effectively stealing the technology of Plaintiffs, which are small, privately funded, "below the radar" companies. If Defendant, who is over 3,000 times bigger than Plaintiffs,⁶⁰ is allowed to continue "stealing" and touting its inventiveness to Plaintiffs' detriment, Plaintiffs will almost certainly lose market opportunities and diminution in their reputation and goodwill (discussed further in Section F below). In addition, it is likely that if Defendant continues its notorious direct use infringement, Plaintiffs will be restricted in their ability to pursue new opportunities in the converged market of connected devices (e.g., tablets, netbooks, telephones, desktops, etc.⁶¹) as Defendant's actions will detract from Plaintiffs market positioning. Plaintiffs' hard earned reputation and technological standing will certainly be diminished, if not snuffed out, and thus suffering unquantifiable and irreparable damages. The character and scope of such damages are what is encompassed in the very concept of irreparable damages.

48. From a financial perspective, as has been discussed in detail above (see ¶17), one should also consider the window of opportunity damages, such as a missed IPO opportunity in formulating one's opinion as to damages and irreparable harm in a case such as this. This is particularly the case given Plaintiffs' history and financial structure and the industry's identification of Plaintiffs as a potential near term IPO candidate. Based on my experience as an

⁶⁰ Based upon revenues.

⁶¹ See Salinger Deposition, p256-259.

Confidential - Attorney's Eyes Only

M&A consultant as well as significant interface with private equities firms, I am especially cognizant of the variables and dynamics associated with a target's successful IPO journey. The ability to "seize the moment" is critical as the uncertainties and vagaries of the market are such that an opening to going public may only occur a single time in the long arduous road to this exceptionally rewarding quest. A bump on the road, such as the effects of the subject infringement on Plaintiffs' operational performance, reputation, market share, ability to convincingly capture the benefits of convergence, etc. can be especially harmful if not fatal to the IPO opportunity. The difficulties of quantifying damages associated with such an IPO are such that they lead to irreparable harm.

F. Aspect of Damages: Loss of Goodwill

49. Similar to irreparable harm, "goodwill" can mean different things to different parties, and therefore I need to clearly state a definition. Most often, when the term "goodwill" is used in financial or legal frameworks, it encompasses the full plethora of favorable intangible assets possessed by a company. This is the context in which I am using the term goodwill.⁶²

50. Plaintiffs have goodwill due in large part to the protection afforded them by the Subject Patent and their effective economic exploitation of this technology over a number of years. This has enabled Plaintiffs to develop a very valuable reputation, cadre of customers, market position, etc. All of these intangible asset items are individual aspects that make up the entire value of Plaintiffs' goodwill. This goodwill further acts as a springboard to enhance their ability to economically exploit opportunities, both currently and in the future. While I have not performed a full analysis of Plaintiffs with regards to their intrinsic goodwill, it seems obvious

⁶² In strict intangible asset theory, the term "goodwill" refers to a company's internal ability to generate a return above and beyond that considered to be "typical" for its risk level (i.e., greater than its peers).

Confidential - Attorney's Eyes Only

that a company that has a global market share of almost two-thirds of one sector has an advantage over its peers, is highly regarded by the overall market and therefore most certainly has considerable goodwill. Before Defendant's infringement, Plaintiffs were a patent protected global market leader free to advantageously exploit all the current and future avenues of its technology. Defendant's infringement has reduced or eliminated that protection and exploitive ability⁶³. If Defendant is allowed to continue to expropriate Plaintiffs technology, it will not only diminish the value of the Subject Patent, but it will also diminish the value of Plaintiffs' goodwill (and all intangible assets encompassed therein.)

51. While goodwill can be valued by a number of methods, it will be difficult to value the full diminishment of goodwill, as it will be nearly impossible to determine to what extent and when the full impact of Defendant's actions will be incurred. If one cannot determine with reasonable certainty the full impact of Defendant's actions, one will certainly not be able to fully quantify the amount that Plaintiffs' goodwill is impaired. Therefore, one will likely not be able to determine, with reasonable certainty, the full impact of this aspect of damages, and consequently, Plaintiffs will be irreparably harmed.

52. When assessing one component of goodwill, Plaintiffs' reputation, one must realize that not only is Defendant directly infringing on the Subject Patent via its own use, and not only is Defendant freely distributing the infringing software to the universe at large, but it is doing so in a notorious fashion. Defendant, a virtual goliath-sized company as compared to Plaintiffs, has heavily marketed and touted this invention via blog-sites and marketing releases as its own proud invention and has received accolades by many (see the several examples below). By Defendant

Confidential - Attorney's Eyes Only

being permitted to practice such notorious behavior, and not affording Plaintiffs their well-deserved credit for inventing the techniques embodied in the Subject Patent, Defendant is effectively denouncing and negating Plaintiffs' exhaustive efforts, inventiveness, and intellectual respect. In essence, Defendant is weakening and undermining, if not destroying, Plaintiffs' "value driver" or "goodwill engine". Because Defendant and Plaintiffs are head-to-head competitors in this broad market, such flaunting or destructive behavior is enhancing Defendant's reputation to the detriment of Plaintiffs' reputation. One of the more obvious examples of this loss of reputation can be observed in several of the comments posted on various "Chromium Blogs" following the release of Courgette:

"Impressive... thanks for talking about this. Hopefully others will take note and implement similar mechanisms. This will only make the entire ecosystem better..." (GOOG-00026259)

"I love you Google" (GOOG-00026259)

"Great idea..." (GOOG-00026260)

"Very nice, this inventiveness is what I love about Google." (GOOG-00026260)

"I'm continually impressed with Google's strive for speed..."
(GOOG-00026260)

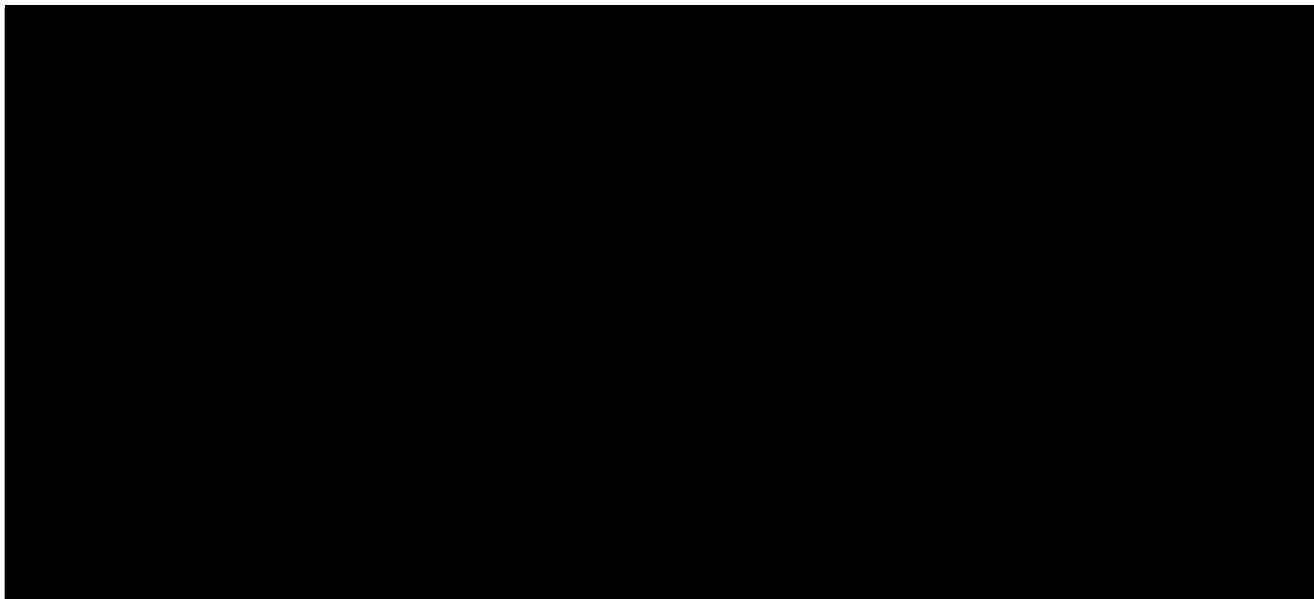
"That is so cool, you read about that stuff in algorithms but to see it in practice is really cool." (GOOG-00026260)

"...great job guys, the compression you achieved is impressive."
(GOOG-00026262)

"...it makes you smack yourself on the head and go 'why hasn't everybody been doing this for years?'" (GOOG-00037829)

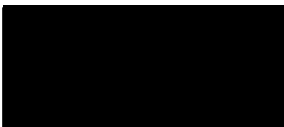
"This really is impressive – its innovation like this that makes chrome feel more cutting-edge than other browsers." (GOOG-00021877)

"Is it just that everyone else is lazy or stupid, or that Google simply refuses to not question to status quo?" (GOOG-00021877)



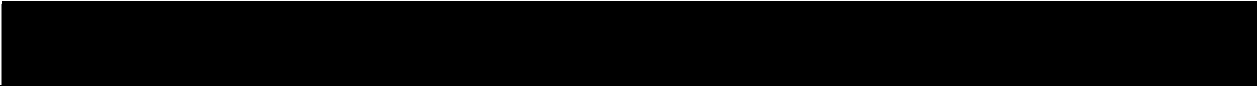
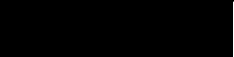
53. Thus, from these comments [REDACTED] it is obvious that Defendant is usurping the credit and reputation enhancement for the technology and processes invented by Plaintiffs, i.e. shifting of Plaintiff's goodwill unto the Defendant. One can only imagine the different result in the form of increased reputation and technological respect if Defendant had given proper credit to Plaintiffs for developing the technology embodied in the Subject Patent. In which case, Plaintiffs' well earned reputation would have increased as it deservedly should. Defendant's actions have likely tarnished Plaintiffs' reputation with the direct consequence of stunting its growth.

54. Due to its intangible nature, "loss of reputation" is typically very difficult to quantify. Even if one could quantify that Plaintiffs' reputation has been lost or diminished (i.e., through statistical methods, surveys, etc.), it would be difficult to quantify "by how much" to a reasonable certainty. Because it is unlikely that one will be able to quantify this aspect of damages, which almost certainly exists, Plaintiffs will suffer irreparable harm.



G. Conclusion of Opinion

55. Therefore, based upon my discussion above, it is my opinion that Plaintiffs will suffer irreparable harm through Defendant's direct use of the Subject Patent and further through its unbridled "open source" distribution of such technology. Such irreparable harm will be caused


 in addition to the likely inability to fully quantify all aspects of damages, namely the loss of royalty revenues, the loss of current and future customers (i.e., unquantifiable loss of market share), irreversible price erosion, the loss of market opportunities (including loss of window of opportunity), the loss of goodwill, and the loss of reputation.

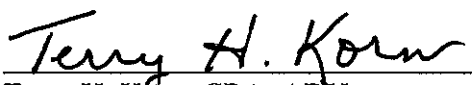
IV. MATERIALS CONSIDERED

56. In Exhibit 2, I list the materials that I have considered with regards to this declaration.

57. I reserve the right to supplement this declaration upon receipt of any additional relevant information or upon discovery of inaccuracies or omissions.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 24, 2010
New York, New York


Terry H. Korn, CPA, ABV
360 Madison Avenue
New York, New York 10017

BIOGRAPHY — Terry H. Korn, CPA, ABV

Exhibit 1

Terry H. Korn is a partner and Co-Director of Berdon LLP's Litigation and Business Valuation Group. Berdon, based in New York City, is one of the top 30 accounting and business advisory firms in the U.S. Prior to joining Berdon, he was a partner and the National Director of Valuation Services at Coopers & Lybrand LLP, and the Regional Managing Partner of the Valuation Services Group for the Metro New York/Northeast Region of Arthur Andersen LLP.

In a valuation and damages consulting career spanning 30 years, he has been involved in numerous engagements encompassing virtually every industry for a variety of purposes. Mr. Korn has particular experience in computing damages and preparing valuations of patents, trademarks, tradenames, copyrights, and trade secrets (know-how). He has been involved in several hundred patent valuations cutting across most industries and some one hundred trademark/tradename valuations. Mr. Korn has been accepted as an expert witness in intellectual property lost profits and royalty damages.

Mr. Korn is a leading figure in formulating U.S. valuation standards, approaches, and policy as is demonstrated by his induction into the Valuation Hall of Fame. He has held leadership positions in the following industry organizations:

- Founder and Chairman of the Business Valuations and Appraisals Subcommittee of the American Institute of Certified Public Accountants.
- Chairman, Accredited in Business Valuation (ABV) Examination Committee of the American Institute of Certified Public Accountants — responsible for developing the test for the ABV designation.
- Member, Board of Trustees of the Appraisal Foundation — the organization empowered by the U.S. Congress to promulgate valuation standards (the "USPAP Standards") to be used in federally related transaction appraisals (valuations) and establish qualification criteria for licensing and certification of appraisers. Selected to the Board as the original representative for business valuation.
- Chairman, Technical Review Board — Business Valuation (Advanced Study) of the American Institute of Certified Public Accountants.

Mr. Korn has an extensive background in providing training in valuation and commercial damages to law firms, as well as specialized advanced training for litigators in cross examination techniques of such expert witnesses. He has also participated in the following:

- • New York University School of Law — seminar in valuation theory and practice.
- • AICPA Annual Business Valuation Conference — Steering Committee and presenter.

Mr. Korn holds an Advanced Professional Certificate in Accounting (Post Graduate) from New York University, an MBA in Finance and Business Economics from the University of Southern California, and a Bachelor of Engineering from The City College of New York.

Mr. Korn is a CPA in New York and Pennsylvania (inactive). He has also earned the Accredited in Business Valuation (ABV) designation of the American Institute of Certified Public Accountants.

Confidential - Attorney's Eyes Only

TESTIMONY — Terry H. Korn, CPA, ABV

Exhibit 1

In the preceding four years, Terry H. Korn has testified as an expert in the following matters:

- Karen Kwong So v. R & M Richards, Inc., Supreme Court of the State of New York, County of New York
- Beverage Marketing USA, Inc. and Hornell Brewing Co., Inc. (Arizona Beverages) v. South Beach Beverage Company, Inc. (PepsiCo, Inc.) and John Bello, Supreme Court of the State of New York, County of Nassau
- InviteHealth, Inc. v. Humana MarketPOINT, Inc., American Arbitration Association Case No. 13 193 00578 05
- Watering II, LLC and HMN Holdings, LLC, in its own capacity and derivatively on behalf of eClassics.com, LLC v. Speed Channel Inc., Superior Court of the State of Vermont, County of Bennington
- New York University v. AutoDesk, Inc., U.S. District Court, Southern District of New York
- Thomas Publishing Company v. Industrial Quick Search, Inc., JAMS New York Case No. 1420017273
- Francis J. McDonough v. W. H. Reaves & Co., Inc., NASD Dispute Resolution Case No. 06-02188
- Bank of America, N.A. and Fleet Precious Metals Inc. v. Allen Bloom, Combine International, Inc., Shrikant Mehta and Roger Parsons, U.S. District Court, District of New Jersey
- American Calcar, Inc. v. American Honda Motor Co., Inc. et al, U.S. District Court, Southern District of California
- Kara Technology Incorporated v. Stamps.com Inc., U.S. District Court, Central District of California
- Jamaica Acquisition, Inc., et al., v. Sylvia Eisenberg, et al., Supreme Court of the State of New York, County of Nassau
- Dennis J. Buckley, as Trustee of the DVI Liquidating Trust v. Deloitte & Touche USA et al, U.S. District Court, Southern District of New York
- Dennis J. Buckley, as Trustee of the DVI Liquidating Trust v. Clifford Chance LLP et al, U.S. District Court, Eastern District of Pennsylvania
- Timex Licensing Corporation v. Advance Watch Company, Ltd., U.S. District Court, District of Connecticut
- Daniel Bielski, et al. v. Royal Plumbing & Heating Corp., et al., U.S. District Court, Eastern District of New York
- Paramount Farms, Inc. v. Ventilex USA, Inc., American Arbitration Association Case No. 72-110-Y-00581-08
- Fernando Viegas for a judgment of dissolution of Tri-Vin Imports, Inc., v. Joao Oliviera a/k/a John Oliviera and Robert Mautner, Supreme Court of the State of New York, County of Westchester

PUBLICATIONS — *Terry H. Korn, CPA, ABV*

Exhibit 1

The following is a list of publications authored by Terry H. Korn within the preceding ten years:

November 1, 2009 "Court Points The Way On Two Critical Issues In Quantifying Damages," Berdon of Proof Newsletter, Berdon LLP

April 1, 2008 "Unearthing Damages For A Losing Business" (*revised from 1997 Berdon of Proof Newsletter, Berdon LLP*)

2006 Berdon of Proof Newsletter, Berdon LLP

2003 Berdon Attorney Alert Newsletter, Berdon LLP

2002 Berdon of Proof Newsletter, Berdon LLP

1999 - 2001 Berdon of Proof Newsletter, David Berdon & Co. LLP

January 1999 "Bankruptcy Court Expanding Application of Discounts," The Bankruptcy Strategist

MATERIALS CONSIDERED

Exhibit 2

As part of this engagement, I and others working under my supervision, reviewed the documents referenced in my Declaration. In addition, I considered the following:

- First Amended Complaint
- Plaintiffs' Motion for a Preliminary Injunction Enjoining Google's Infringement
- Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction Enjoining Google's Infringement
- Google Inc.'s Opposition to Red Bend's Motion for a Preliminary Injunction

- Declaration of Jennifer C. Tempesta in Support of Plaintiffs' Motion for a Preliminary Injunction Enjoining Google's Infringement
- Declaration of Stephen A. Edwards in Support of Plaintiffs' Motion for a Preliminary Injunction Enjoining Google's Infringement
- Declaration of Y. Salinger in support of Plaintiffs' motion for a preliminary injunction enjoining Google's infringement
- Declaration of Y. Salinger in opposition of Google's emergency motion for modification of the preliminary injunction briefing schedule
- Declaration of W. Christopher Bakewell (with associated exhibits and supporting documents)
- Declaration of Susan Baker Manning in Support of Defendant and Counterclaim-Plaintiff Google Inc.'s Opposition to Red Bend's Motion For a Preliminary Injunction
- Declaration of Martin G. Walker, PhD, in Support of Google's Opposition to Plaintiffs Motion for a Preliminary Injunction

- Deposition of Yoram Salinger (with associated exhibits)
- Deposition of W. Christopher Bakewell
- Deposition of Mr. Brian Nathan Bershad

- Letter from Y. Salinger (Red Bend) to J. Whitehurst (Red Hat) re: follow-up from cease & desist for Fedora Project
- Letter from S. Manning (Bingham McCutchen) to E. Williams (Baker Botts) re: Google has no record of # of times Courgette code was downloaded or accessed or the identity of those who accessed.
- Transmittal Letter from Bingham to Baker Botts & Dwyer Collara re: documents CB0134-138
- Various Form 10-K Filings for Google Inc.
- Information from "online investor", see: <http://www.theonlineinvestor.com>
- Various information from www.redbend.com
- <http://www.siliconrepublic.com/news/article/15446/business/in-three-years-desktops-will-be-irrelevant-google-sales-chief>
- Various information obtained from Finance.yahoo.com
- "Smartphones will shake up paid content debate", Reuters.com, March 11, 2010
- Chart cataloging non-party use of Courgette

MATERIALS CONSIDERED (continued)

Exhibit 2

- “Convergence or Divergence: Will the big PC & Internet players turn mobile phones into PCs?”, by Morton Grauballe & Richard Kinder, *Wireless Business & Technology*, February 15, 2008
- 2010 M&A Outlook - Mobility TechDealMaker
- “Penalties for Microsoft Argued - Nine States Seeking Changes that Could Benefit Competitors”, *Richmond Times Dispatch*, December 8, 2001
- Abbott Laboratories v. Sandoz, Inc., 544 F.3d 1341 (2008)
- Acumed LLC v. Stryker Corporation, et al., 551 F.3d 1323 (2008)
- Broadcom Corporation v. Qualcomm Incorporated, 543 F. 3d 683 (2008)
- Concrete Washout Systems, Inc. v. Washout Systems, LLC, 2008 WL 5411965 (E.D.Cal.) (2008)
- Donald C. Winter, Secretary of the Navy, et al. v. Natural Resources Defense Council, Inc., et al., 129 S.Ct. 365 (2008)
- Eli Lilly and Company v. Teva Pharmaceuticals USA, Inc., 609 F.Supp.3d 786 (2009)
- Everett Laboratories, Inc. v. Breckenridge Pharmaceutical, Inc., 573 F.Supp.2d 855 (2008)
- Finjan Software, Ltd. V. Secure Computing Corporation, et al. 2009 WL 2524495 (D.Del.) (2009)
- Frank Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct.2561 (1975)
- Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp 1116 (S.D.N.Y. 1970)
- General Motors Corporation v. Devex Corporation et al., 461 U.S. 648, 103 S.Ct. 2058 (1983)
- Hybritech Incorporated v. Abbot Laboratories 849 F.2d 1446
- i4i Limited Partnership and Infrastructures for Information Inc. v. Microsoft Corporation, 589 F.3d 1246 (2009)
- Innovention Toys, LLC v. MGA Entertainments, Inc., Wal-mart Stores, Inc., and Toys "R" Us, Inc., 665 F. Supp. 2d 636 (2010)
- K-Mart Corporation v. Oriental Plaza, Inc., 875 F.2d 907 (1989)
- Mass Engineered Design, Inc. and Jerry Morscovitch v. Ergotron, Inc. and Dell Marketing L.P., 633 F.Supp.2d 361 (2009)
- Mortgage Electronic Registration Systems, Inc. v. John Brosnan, Mortgage Electronic Registration Systems, Inc., and Robert Jacobsen, 2009 WL 3647125 (2009)
- Oxford Global Resources, Inc. v. Sabatino Guerriero, David Smith, and Matthew D'Agostino, 2003 WL 23112398 (2003)
- Reebok International Ltd. V. J. Baker, Inc., 32 F.3d 1552 (1994)
- Sanofi-Synthelano, Sanofi-Synthelano, Inc., and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership v. Apotex, Inc. and Apotex Corp., 470 F.3d. 1368 (2006)
- Trimark USA, Inc. v. Performance Food Group Company, LLC, 2009 WL 3524707 (2009)
- Vaqueria Tres Monjitas, Inc.; Suiza Dairy, Inc. v. Cyndia E. Irizarry, et al., 587 F.3d 464 (2009)

Confidential - Attorney's Eyes Only

MATERIALS CONSIDERED (continued)

Exhibit 2

In addition, I considered information contained in the following bates ranges:

CB 0001 to 0007	GOOG 21888 to 21889
CB 0008 to 0015	GOOG 21944 to 22025
CB 0016 to 0022	GOOG 22048 to 22090
CB 0023 to 0031	GOOG 22569 to 22571
CB 0032 to 0039	GOOG 23234
CB 0040 to 0084	GOOG 23357
CB 0041 to 0084	GOOG 23454
CB 0085 to 0106	GOOG 23522
CB 0085 to 0106	GOOG 23523 to 23524
CB 0107 to 0109	GOOG 23935 to 23936
CB 0110 to 0123	GOOG 24141 to 24143
CB 0110 to 0123	GOOG 24178
CB 0124 to 0125	GOOG 24194 to 24215
CB 125 to 133	GOOG 24273 to 24278
CB 0126 to 0129	GOOG 24282
CB 0130 to 0133	GOOG 24283 to 24292
CB 0134 to 0138	GOOG 24293 to 24294
GOOG 698 to 699	GOOG 24295 to 24296
GOOG 1050 to 1051	GOOG 24312 to 24313
GOOG 1723 to 17224	GOOG 26259 to 26265
GOOG 17206 to 17208	GOOG 26266 to 26269
GOOG 17217	GOOG 27268 to 27271
GOOG 17222	GOOG 27810 to 27812
GOOG 17280	GOOG 27845 to 27846
GOOG 17321	GOOG 27847 to 27850
GOOG 17351 to 17352	GOOG 28206 to 28247
GOOG 17410 to 17411	GOOG 28252 to 28255
GOOG 17424	GOOG 28418
GOOG 17425 to 17430	GOOG 28632 to 28639
GOOG 17441 to 17446	GOOG 28794
GOOG 17481	GOOG 28803 to 28804
GOOG 17570	GOOG 28813 to 28814
GOOG 17573	GOOG 36940
GOOG 17648	GOOG 36986 to 37011
GOOG 17662	GOOG 37056 to 37057
GOOG 17664 to 17666	GOOG 37167
GOOG 17705 to 17714	GOOG 37168 to 37169
GOOG 17715 to 17717	GOOG 37174 to 37176
GOOG 21432 to 21477	GOOG 37208 to 37208
GOOG 21835 to 21836	GOOG 37367
GOOG 21873 to 21874	GOOG 37408 to 37409
GOOG 21876 to 21877	GOOG 37521 to 37570

Confidential - Attorney's Eyes Only

MATERIALS CONSIDERED (continued)

Exhibit 2

GOOG 37703	Red Bend 8754 to 8845
GOOG 37706 to 37707	Red Bend 9056
GOOG 37728	Red Bend 9057 to 9084
GOOG 37789	Red Bend 9057 to 9084
GOOG 37829	Red Bend 9240 to 9247
GOOG 37874	Red Bend 9301
GOOG 38312 to 38325	Red Bend 9674 to 9700
GOOG 39074	Red Bend 9674 to 9700
GOOG 39208	Red Bend 9674 to 9700
GOOG 39240 to 39242	Red Bend 9824 to 9836
GOOG 39372 to 39373	Red Bend 9824 to 9836
GOOG 39423	Red Bend 9824 to 9836
GOOG 39436	Red Bend 10287 to 10289
GOOG 39438	Red Bend 10287 to 10289
GOOG 39447 to 39448	Red Bend 10682
GOOG 39449 to 39450	Red Bend 10716 to 10718
GOOG 39496 to 39497	Red Bend 10933 to 10935
GOOG 39502 to 39505	Red Bend 10952 to 10956
GOOG 39510	Red Bend 10993 to 11022
GOOG 39511 to 39512	Red Bend 11023 to 11024
GOOG 39553	Red Bend 11025 to 11032
GOOG 39554	Red Bend 11033 to 11035
GRB 1775	Red Bend 11036 to 11038
GRB 1799	Red Bend 11039 to 11039
Red Bend 518 to 538	Red Bend 11040 to 11045
Red Bend 539 to 558	Red Bend 11046 to 11048
Red Bend 559 to 578	Red Bend 11049 to 11054
Red Bend 579 to 598	Red Bend 11055
Red Bend 599 to 617	Red Bend 11056 to 11068
Red Bend 599 to 617	Red Bend 11069 to 11072
Red Bend 2498 to 2517	Red Bend 11073 to 11077
Red Bend 2499 to 2517	Red Bend 11078 to 11082
Red Bend 2618 to 2622	Red Bend 11083 to 11085
Red Bend 2632 to 2636	Red Bend 11086 to 11090
Red Bend 3011 to 3031	Red Bend 11091
Red Bend 5450 to 5462	Red Bend 11092 to 11093
Red Bend 5589 to 5608	Red Bend 11094 to 11101
Red Bend 5665 to 5666	Red Bend 11102 to 11136
Red Bend 5757 to 5762	Red Bend 11137 to 11139
Red Bend 5877 to 5879	Red Bend 11140 to 11145
Red Bend 5877 to 5879	Red Bend 11146 to 11150
Red Bend 7896 to 7913	Red Bend 11151 to 11166
Red Bend 7896 to 7913	Red Bend 11167 to 11171
Red Bend 8323 to 8373	Red Bend 11172 to 11173
Red Bend 8542 to 8566	Red Bend 11174 to 11177

Confidential - Attorney's Eyes Only

MATERIALS CONSIDERED (continued)

Exhibit 2

Red Bend 11178 to 11180
Red Bend 11181 to 11182
Red Bend 11183 to 11184
Red Bend 11198 to 11199
Red Bend 11200 to 11203
Red Bend 11204 to 11205
Red Bend 11206 to 11210
Red Bend 11211 to 11212
Red Bend 11213 to 11215
Red Bend 12063 to 12076
Red Bend 12077 to 12086
Red Bend 12087 to 12090

Red Bend 11185 to 11186
Red Bend 11187 to 11188
Red Bend 11189 to 11197

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 March 24, 2010.

By: */s/ Jennifer C. Tempesta*

Jennifer C. Tempesta