

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RED BEND LTD. and
RED BEND SOFTWARE INC.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

CIVIL ACTION
NO. 09-cv-11813

GOOGLE INC.,

Counterclaim-Plaintiff,

v.

RED BEND LTD. and
RED BEND SOFTWARE INC.,

Counterclaim-Defendants.

**GOOGLE'S ASSENTED-TO MOTION FOR LEAVE
TO FILE SURREPLY IN SUPPORT OF ITS OPPOSITION TO RED BEND'S
MOTION FOR A PRELIMINARY INJUNCTION**

I. INTRODUCTION

Defendant Google Inc. hereby moves pursuant to Local Rule 7.1(B)(3), for leave to file a surreply memorandum to address the many new theories, declarants, and evidence offered for the first time by Red Bend in its Reply In Support Of Its Motion For A Preliminary Injunction Enjoining Google's Infringement (Docket Nos. 58 and 62) and supporting papers (Docket Nos. 59-61 and 63-65) (collectively, the "Reply"). Granting Google's motion will further focus the issues and permit Google the opportunity to confront the new evidence and arguments from Red Bend so that the Court may decide the preliminary injunction motion on the merits. Red Bend assents to this motion.

In further support of its motion, Google submits as follows:

II. STATEMENT OF FACTS

Red Bend filed the Complaint against Google on October 26, 2009, three and a half months after learning of and beginning to study the Courgette open source code it accuses of infringing. (Docket no. 6). On November 17, 2009, Red Bend served the Complaint, and on the same day filed a motion for a preliminary injunction (the “Preliminary Injunction Motion”), (Docket No. 8), supported by the conclusory declarations of Yoram Salinger, Red Bend’s President and Chief Executive Officer, and Dr. Stephen Edwards, Red Bend’s hired technical expert (collectively, the “Declarants”) (Docket No. 9). Red Bend’s Motion seeks the extreme order of shutting down Google’s security, feature and functionality updating technology for Google’s Chrome web browser used by millions of internet users, requiring Google to take down the published open source code, and to publish a statement regarding Red Bend’s purported patent rights.

The Court initially set a briefing schedule whereby Google’s opposition brief to the Preliminary Injunction Motion was due by January 25, 2010, Red Bend’s reply brief was due by February 5, 2010 and a hearing on the Motion was to be held on January 25, 2010. (December 2, 2009 Electronic Clerk’s Notes). The Court modified the schedule on January 19, 2010, in light of Red Bend’s refusal to make its declarants available for deposition and in response to Google’s Emergency Motion to Compel Depositions or in the Alternative Strike Depositions of Yoram Salinger and Stephen Edwards and/or Preclude Reply Briefing. (Doc. No. 31.) Google timely filed its opposition brief on March 1, 2010, and Red Bend replied on March 24, 2010. A hearing on the Preliminary Injunction Motion is to be held on April 14, 2010. (January 19, 2010 Electronic Clerk’s Notes.)

Red Bend’s Reply contained several new theories, as well as new evidence - including a fifty-one page new declaration from Dr. Stephen Edwards, Red Bend’s technical expert, and a declaration from Red Bend’s new damages expert, Terry H. Korn. Red Bend could have, but failed to, include this new evidence in its opening papers. Allowing this information to stand

unanswered is inequitable and serves to prejudice Google, particularly given the extraordinary relief of the preliminary injunction that Red Bend seeks.

Counsel for the parties conferred on April 8, 2010 regarding the instant motion. Eliot Williams, counsel for Red Bend, indicated that Red Bend would assent to Google's motion seeking leave to file a surreply memorandum.

III. GOOGLE SHOULD BE ALLOWED TO FILE A SURREPLY TO ADDRESS NEW ARGUMENTS RAISED BY RED BEND'S REPLY

It is well settled in this District that a movant has an affirmative responsibility to include the legal and evidentiary support for a motion in the opening papers, and that arguments made for the first time in an reply brief come too late and need not be addressed. *In re Boston Regional Medical Center, Inc.*, 328 F. Supp. 2d 130, 143 (D. Mass. 2004); *see also McCoy v. MIT*, 950 F.2d 13, 23 (1st Cir. 1991) (“[T]he plaintiff has an affirmative responsibility to put his best foot forward in an effort to present some legal theory that will support his claim.”); *cf. Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 354 (1st Cir. 1992) (“It is well settled in this court, for good reason which need not be rehearsed here, that a legal argument made for the first time in an appellant’s reply brief comes too late and need not be addressed.”).

Should the Court be inclined to consider Red Bend’s new arguments and evidence, good cause exists to allow Google to file the surreply attached hereto as Exhibit A. The surreply is necessary to permit Google an opportunity to fully respond to the new arguments and evidence contained in the Reply as well as correct the numerous factual misstatements by Red Bend in the Reply so that the Court may make a fully informed decision on the merits. As discussed more fully in the attached surreply, each of the arguments raised in Red Bend’s Reply is unavailing and does not provide a valid basis for entering a preliminary injunction against Google.

IV. CONCLUSION

Google respectfully requests entry of an order permitting Google to file the surreply attached hereto as Exhibit A.

Dated: April 8, 2010

Respectfully Submitted,

Google Inc.,
By its attorneys,

/s/ David M. Magee
Jonathan M. Albano, Bar No. 013850
jonathan.albano@bingham.com,
David M. Magee, Bar No. 652399
david.magee@bingham.com
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
Telephone: 617.951.8000

Susan Baker Manning (*pro hac vice*)
susan.manning@bingham.com,
Robert C. Bertin (*pro hac vice*)
r.bertin@bingham.com
Elizabeth Austern (*pro hac vice*)
elizabeth.austern@bingham.com
BINGHAM McCUTCHEN LLP
2020 K Street, NW
Washington, D.C. 20006-1806
Telephone: 202.373.6000

William F. Abrams (*pro hac vice*)
william.abrams@bingham.com,
BINGHAM McCUTCHEN LLP
1900 University Avenue
East Palo Alto, CA 94303-2223
Telephone: 650.849.4400

Local Rule 7.1 Certification

I hereby certify that counsel to Google Inc. and counsel to the plaintiffs conferred with respect to this motion and that plaintiffs' counsel assent thereto.

/s/ David M. Magee
David M. Magee

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, by federal express, on April 8, 2010.

/s/ David M. Magee
David M. Magee