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.	

DEFENDANT GOOGLE INC.'S NOTICE OF POST-HEARING FACTUAL DEVELOPMENTS IN THE REEXAMINATION PROCEEDING AT THE U.S. PATENT AND TRADEMARK OFFICE

On March 23, 2010, the U.S. Patent and Trademark Office ("PTO") commenced a reexamination of the patent-in-suit, U.S. Patent No. 6,546,552 ("the '552 patent"). On May 28, 2010, the PTO rejected 36 claims of the '552 patent, including each claim asserted by Red Bend in its Motion for Preliminary Injunction: claims 8-10, 21-23, 42-44, and 55-57 (collectively, the "Asserted Claims"). *See* Ex. A at 18 (copy of office action received by Google on June 2, 2010). The PTO determined that U.S. Patent No. 5,481,713 to Wetmore, *et al*. anticipated each Asserted Claim under 35 U.S.C. § 102(b). The PTO further determined that several Asserted Claims were obvious under 35 U.S.C. § 103(a) in light of Wetmore and U.S. Patent No. 5,790,796 to Sadowsky. *Id.* at 18 (rejecting, *inter alia*, dependent claims 9, 10, 22, 23, 43, 44, 56 and 57 as obvious). The PTO's rejections are based on the same art Google relied on to demonstrate the invalidity

of the Asserted Claims in its opposition to Red Bend's Motion for Preliminary Injunction. *See* Google's Opposition to Red Bend's Motion for a Preliminary Injunction at 27-28 (Dkt. No. 55) and Declaration of Dr. Martin G. Walker at ¶¶ 65-73 & Ex. O (Dkt. No. 48) (both detailing invalidity of the asserted claims in light of Wetmore, Sadowsky and other references).

The PTO's rejection of each Asserted Claim warrants denial of the Motion for Preliminary Injunction.[1] *See* Google Inc.'s Surreply In Support of its Opposition to Red Bend's Motion for a Preliminary Injunction at 17-19 (Dkt. No. 68); *see also, e.g.*, *Avery Dennison Corp. v. Alien Tech. Corp.*, 626 F. Supp. 2d 693, 707 (N.D. Ohio 2009) (denying preliminary injunction motion based on defendant's invalidity arguments and the PTO reexamination office action rejecting the claims); *Everett Labs., Inc. v. River's Edge Pharms., LLC*, No. 09-3458, 2009 U.S. Dist. LEXIS 110945, at *9-10 (D.N.J. Nov. 24, 2009) (because the reexamination and defendant's invalidity defense raised the same issues, the reexamination was particularly probative of whether a substantial question of invalidity had been raised); *The Ohio Willow Wood Co. v. Alps South Corp.*, No. 2:05-1039, 2009 U.S. Dist. LEXIS 87543, at *10 (S.D. Ohio Sept. 8, 2009); *DUSA Pharms., Inc.*, No. 06-1843, 2007 U.S. Dist. LEXIS 16005, at *8 (D.N.J. Mar. 6, 2007) (the court dissolved a preliminary injunction in light of a PTO office action rejecting the claims); *Power Integrations, Inc. v. BCD Semiconductor Corp.*, No. 07-633, 2008 U.S. Dist. LEXIS 108333, at *27-33 (D. Del. Nov. 2, 2008) (the court found that the PTO's first office action during reexamination rejecting the asserted claims raised a substantial question of validity and denied plaintiff's preliminary injunction motion).

[1] Red Bend has recently accused Google of infringing numerous additional claims that were not at issue in the Motion for Preliminary Injunction, most notably independent claims 12, 25, 46 and 59, and certain claims depending from them. The PTO has not rejected these claims as invalid. Because they were not at issue in the Motion for Preliminary Injunction, the status of these claims has no bearing on the Motion for Preliminary Injunction.

For this additional reason, and the reasons set forth in Google's opposition, its surreply, and at the Court's April 14, 2010 hearing, Google respectfully urges the Court to deny Red Bend's Motion for Preliminary Injunction.

Dated: June 4, 2010	GOOGLE, INC. By its attorneys, /s/ David M. Magee . Jonathan M. Albano, BBO # 013850 jonathan.albano@bingham.com David M. Magee, BBO # 652399 david.magee@bingham.com BINGHAM McCUTCHEN LLP One Federal Street Boston, MA 02110-1726, U.S.A. 617.951.8000 William F. Abrams william.abrams@bingham.com BINGHAM McCUTCHEN LLP 1900 University Avenue East Palo Alto, CA 94303-2223 650.849.4400 Robert C. Bertin robert.bertin@bingham.com Susan Baker Manning susan.manning@bingham.com BINGHAM McCUTCHEN LLP 2020 K Street, NW Washington, DC 20006-1806 202.373.6000

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 June 4, 2010.

/s/ David Magee
david.magee@bingham.com