

documents. Exs. M & O.¹ Red Bend made those representations even though just 15 of the documents it produced by the Court's December 22, 2009 deadline were from the files of Sharon Peleg, the sole named inventor of the patent-in-suit as well as Red Bend's Chief Technical Officer and co-founder; none were identified as from the files of its Chief Executive Officer (the sole fact witness in support of the Motion for Preliminary Injunction) or its Chief Financial Officer. By way of contrast, Red Bend has now produced over 38,000 pages of Mr. Peleg's documents, almost 112,000 pages from its CEO, and another 17,000 from its CFO. Literally 99% of Red Bend's production on Google's original and only production requests has occurred in the last two weeks.

Google seeks an emergency status conference because this belated document dump has very serious implications for Mr. Peleg's deposition, scheduled for Wednesday, June 23, 2010, and for the claim construction briefs that are due on Friday, June 25, 2010.² At the April 14, 2010 preliminary injunction hearing, the Court made it clear that it wanted this case to move forward in an orderly fashion, and that it wanted the benefit of cogent claim construction briefing. *See, e.g.,* Hr. Tr. at 39 & 101-03 (Apr. 14, 2010). As the inventor, Mr. Peleg's testimony will be highly pertinent to claim construction. Google had a reasonable expectation of taking his deposition prior to filing its opening claim construction brief, and to do so based on a complete document production.

Google is now endeavoring to prepare for Mr. Peleg's deposition, and to brief claim construction so that it can meet the Court's deadlines, notwithstanding the prejudice against it. But there is no escaping the fact that Red Bend's conduct has made

¹ The pertinent facts are detailed at greater length in Google's concurrently-filed Motion to Strike Red Bend's Motion For Preliminary Injunction. All exhibits referenced herein are attached to the Declaration of Susan Baker Manning in support of Google's motion to strike.

² At the parties' request, the Court has already modified the claim construction briefing schedule once. *See* Dkt. 80 & June 2, 2010 Dkt. Notation. The parties made this request specifically because Red Bend had disclosed to Google that some additional documents would be produced. Despite Google's repeated inquiries as to the estimated size of Red Bend's then-forthcoming production, it had no warning that hundreds of thousands of pages would be produced. Exs. X & Y.

the schedule problematic. Red Bend started this case by insisting that Google move quickly to defend itself, and Google has. Red Bend has not reciprocated. Since the preliminary injunction hearing, Google has served non-infringement and invalidity contentions, and exchanged information with Red Bend on claim construction—all at a time when Red Bend knew, but Google did not, that the record was dramatically incomplete. No matter how hard or how quickly Google works now, it has been and will be prejudiced. In particular, Red Bend’s conduct threatens the integrity of the Court’s upcoming claim construction process.

WHEREFORE, Google believes that these issues can be most efficiently addressed at a brief status conference, and respectfully requests that the Court hold such a status conference as soon as possible in advance of the scheduled June 23 Peleg deposition and scheduled June 25 claim construction briefing.

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Respectfully Submitted,

Dated: June 17, 2010

Google Inc.,
By its attorneys,

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LOCAL RULE 7.1 CERTIFICATION

I hereby certify that on June 17, 2010, counsel to Google Inc. and counsel to the plaintiffs conferred with respect to this motion and that plaintiffs oppose the motion for status conference.

/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 on June 17, 2010.

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