

# **EXHIBIT E**

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## BY ELECTRONIC MAIL

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Re: Red Bend Ltd. v. Google Inc., Case No. 09-cv-11813

Dear Susan:

We write in response to your letter of today's date directed to Red Bend's responses to Google's First Set of Requests for Production.

### Google's Requests for Production Nos. 4 and 6

To the extent Google suggests that Red Bend controls documents in the possession of its independent expert, we disagree and note that Rule 45 is available to the extent Google intends to seek production of documents exclusively in the possession, custody or control of its expert. *See Expeditors Int'l of Washington, Inc. v. Vastera, Inc.*, No. 04-0321, 2004 WL 406999 (N.D. Ill. Feb. 26, 2004) ("a subpoena *duces tecum* issued pursuant to Rule 45 is an appropriate discovery mechanism against nonparties such as a party's expert witness"). For instance, Red Bend is not in possession of its expert's prior writings, which would apparently be called for by Google's request. Red Bend will produce documents in its possession, custody or control related to Requests 4 and 6.

### Google's Request for Production No. 16

We disagree with your assertion that Red Bend bears the burden on validity at the preliminary injunction stage. It is Google who first must undertake to challenge the validity of the '552 Patent with specific evidence. "[T]he ['552] patent enjoys the same presumption of validity during preliminary injunction proceedings as at other stages of litigation." *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009). "Thus, unless [Google] the alleged infringer undertakes to challenge validity with evidence, the patentee need do nothing to establish its rights under the patent." *New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992). Therefore, Red Bend maintains its objection to producing documents responsive to this request at this time. If Google provides us with an invalidity contention that genuinely places in issue the invention date of the '552 patent, Red Bend will withdraw its objection to this Request.

Google's Request for Production No. 26

Red Bend agrees to produce non-privileged documents responsive to Request No. 26 as outlined in your letter to the extent that they exist.

Google's Request for Production Nos. 38, 39 and 41

Thank you for your clarification of these requests. Red Bend agrees to produce non-privileged documents responsive to these requests to the extent that they exist.

Very truly yours,

*Jennifer C. Tempesta*

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