

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

RED BEND LTD., and
RED BEND SOFTWARE INC.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 09-cv-11813-DPW

**PLAINTIFFS' OPPOSITION
TO GOOGLE INC.'S EMERGENCY
MOTION FOR STATUS CONFERENCE**

Plaintiffs Red Bend Ltd. and Red Bend Software Inc. (collectively "Red Bend") submit this opposition to Defendant Google Inc.'s ("Google") emergency motion for a status conference to address "the current claim construction and deposition schedule" ("the motion").

A. Preliminary Statement

Unfortunately, Google has not attempted to meet and confer in good faith with Red Bend regarding the scheduling issues raised by Google's motion for a status conference. Google did not give Red Bend notice that it wished to modify the schedule, did not propose (and still has not proposed) an alternative schedule, and did not attempt to reach a resolution of this scheduling issue before involving the Court. Aside from this procedural deficiency, Google's motion lacks merit but, nonetheless, as explained below, as Red Bend informed Google this evening (*see* Exh. 1), Red Bend is amenable to adjusting the current schedule to give Google more time.

Google complains that its review of Red Bend's recent document production (which documents are related almost entirely to the damage issues in this case)¹ has implications for

¹ Damages were not at issue in the preliminary injunction phase of this case, and therefore these documents were not previously produced. As this is a patent case where Red Bend is seeking damages for lost profits and diminution in company value due to Google's willful infringement, there are numerous documents relevant to damages. Indeed, several courts have recognized patent cases are unique "because of the complex nature of the damages determination and the extensive discovery that is often necessary to prove the nature and extent of those damages." *See*

claim construction and Mr. Peleg's deposition. This is simply not correct. It is black letter law that in order to construe the claims, the Court looks to the patent, its file history, and only as a last resort to extrinsic evidence such as inventor testimony. *See generally Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). Further, all of Mr. Peleg's remaining responsive and unprivileged documents were produced three (3) weeks ago at least by May 28, 2010. There is no legitimate reason that counsel for Google cannot be prepared to take his deposition as scheduled. Google's motion is merely an attempt to divert Red Bend's resources from the merits, from preparing for the upcoming claim construction briefing deadline, and to prematurely draw this Court into a routine scheduling dispute.

B. Google's Motion is Premature

Google's motion circumvents this Court's Local Rules, which require that the parties meet and confer and attempt to narrow the issues before involving the Court. Although counsel for Google telephoned counsel for Red Bend to inform Red Bend that it would be filing this motion this afternoon, it did so less than two hours before filing its motion, and did not "confer in good faith to narrow the areas of disagreement to the greatest possible extent." L.R. 37.1. Indeed, in its initial call this afternoon, Google indicated only that it planned to request an emergency status conference, without informing Red Bend what the status conference would be about, why it was an "emergency," or explaining what relief (if any) it would be seeking at the status conference. Indeed, despite having already filed its motion, Google has still not proposed an alternative schedule.

Red Bend is amenable to extending the schedule, within reason, if Google needs additional time to prepare for the deposition of Mr. Peleg, or to prepare its claim construction briefing. Red Bend informed Google of its willingness to discuss scheduling this evening. (*See* Exh. 1). Red Bend awaits Google's reply.

e.g., Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998). *See also Smith v. Alyeska Pipeline Serv. Co.*, 538 F.Supp. 977, 982-83 (D.Del. 1982), *aff'd*, 758 F.2d 668 (Fed. Cir. 1984).

C. Google's Motion is Unfounded

Google's motion complains that Red Bend has recently produced documents, and that this document production has "serious implications" for the upcoming deposition of Mr. Peleg, the inventor of Red Bend's '552 Patent because "Mr. Peleg's testimony will be highly pertinent to claim construction." This is simply incorrect in several respects. First, Red Bend's recent document production in "the last two weeks" was not from the files of Mr. Peleg. Second, "inventor testimony as to the inventor's subjective intent is irrelevant to the issue of claim construction" *Cordis Corp. v. Boston Scientific Corp.*, 561 F.3d 1319, 1338 (Fed. Cir. 2009) (quoting *Howmedica Osteonics Corp. v. Wright Med. Tech., Inc.*, 540 F.3d 1337, 1346-47 (Fed. Cir. 2008)). It is well settled that "[t]he testimony of an inventor 'cannot be relied on to change the meaning of the claims.'" *Howmedica*, 540 F.3d at 1346 (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 983 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996); *see also Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1580 (Fed. Cir. 1996) ("*Markman* requires us to give no deference to the testimony of the inventor about the meaning of the claims.")).

Third, even if the inventor's documents or testimony were somehow relevant to claim construction, Google has been in possession of all those documents since May 28, 2010. (*See* Exh. 2). Indeed, despite repeatedly pointing out to Google that Mr. Peleg's deposition would be irrelevant to claim construction issues and was premature (*see, e.g.*, Exh. 3), when Google persisted with its requests to proceed with that deposition, Red Bend went out of its way to make Mr. Peleg's additional documents available to Google as soon as possible in advance of the deposition, moving those documents to the front of its review and production process. Google makes no attempt to explain why it is unable to review the documents and take Mr. Peleg's deposition on the currently scheduled date of June 23. Indeed, until a few hours ago, Google failed to express, and Red Bend was unaware, that Google is seemingly unable to properly prepare for Mr. Peleg's deposition and claim construction briefing.

D. Conclusion

Based on the foregoing, Red Bend respectfully submits that an emergency status conference is unnecessary, that the parties at least first attempt to work out an alternate schedule to propose to the Court, and requests that Google's emergency motion for a status conference be denied.

Dated: June 17, 2010

Respectfully submitted,

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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.

By: */s/ Jennifer C. Tempesta*

Jennifer C. Tempesta