UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

SKYHOOK WIRELESS, INC., Plaintiff and Counterclaim-Defendant, v. GOOGLE INC., Defendant and Counterclaimant.	)	Civil Action No. 1:10-cv-11571-RWZ

OPPOSITION TO DEFENDANT GOOGLE INC.'S EMERGENCY MOTION TO PRECLUDE PRESENTATIONS BY FACT WITNESS AT THE TECHNOLOGY TUTORIAL

Skyhook intends to have Ted Morgan, its CEO and one of the named inventors of the patents in suit, participate in the technology tutorial in order to better aid the Court in understanding the technology at issue in this case. But Defendant argues that because "Mr. Morgan [is] a person having information regarding the patents-in-suit and Skyhook's technology," it would be "inappropriate and prejudicial" to allow him to explain to the Court the technology that he helped develop. (Def. Mot. (Dkt. 64) at 3.)

Defendant misses the point. Ted Morgan's unsurpassed knowledge and experience regarding the patented technology is precisely why his presence at the tutorial will be helpful. Skyhook believes that Ted Morgan's knowledge and experience makes him uniquely qualified to present to, and to answer questions from, the Court. Indeed, no individual is more qualified in this regard due to Mr. Morgan's experience over the last eight years developing and conducting presentations regarding Skyhook's technology.

Furthermore, Skyhook agrees with Defendant's assertion that if Ted Morgan presents at the technology tutorial, Defendant "would be entitled to have an expert or other witness give its presentation," because Skyhook believes that the tutorial would be more helpful if presented by highly-qualified individuals such as Mr. Morgan. However, Defendant fails to explain its counterintuitive position that the presentation of experts, who are in the best position to understand and explain the technology at issue, would be "contrary to an efficient and effective tutorial." (Abrams Letter to Court, Oct. 14, 2011 (Dkt. 65) at 2.)

Likewise, Defendant's concern that Ted Morgan's participation at the tutorial will constitute "a key fact witness" "testify[ing] in the guise of a tutorial," (Manning E-mail, Oct. 13, 2011, 6:43 PM EDT (Pl. Ex. 1)), is unfounded. Skyhook has already stated it is "willing to stipulate that neither side's presentation shall be 'testimony' used for any purpose other than educating the Court." (Lu Letter to Court, Oct. 14, 2011 (Dkt. 63).) Under such a stipulation, Ted Morgan could no more "testify in the guise of a tutorial" than could Skyhook's counsel. Thus, contrary to Defendant's assertions, there is no evidentiary distinction between the presentation of counsel and Ted Morgan — the only difference is that Ted Morgan is far more knowledgeable about and experienced with the subject matter of the presentation, as he has had nearly a decade of experience working with and presenting the technology at issue.

Finally, Defendant provides no evidence or reasoning for its assertion that Ted Morgan's role as a trial witness will be "inappropriate and prejudicial." (Def. Mot. (Dkt. 64) at 3.) Mr. Morgan's presentation at the technology tutorial will not, as Defendant seems to imply, interfere with Defendant's plans to depose him. If anything, Ted Morgan's presentation would aid Defendant in preparing for such a deposition, because the presentation would provide Defendant

with an early opportunity to listen to a summary of Mr. Morgan's understanding of the technology that he helped to create.

Because Defendant cannot explain why it will be prejudiced by Ted Morgan's participation, Defendant must resort to vague allegations regarding its interpretation of the December 14, 2010 scheduling conference. Although no decision was reached during that conference, (Lu Decl. at ¶ 3), Defendant ambiguously asserts that the Court "indicated" that the presentation "should" be conducted by attorneys. (Abrams Decl. (Def. Ex. 1) at ¶ 3.) Notably, Defendant does not claim any "indication" that experts and fact witnesses were barred from participating. (*See id.*) These open-ended allegations tellingly omit key information, and belie an uncertainty concerning the details of a scheduling conference that occurred ten months ago.

Defendant further claims that the parties reached an oral agreement that the tutorial would be conducted solely by counsel. (Def. Mot. (Dkt. 64) at 2.) No such agreement was reached. Indeed, the parties never discussed this issue, only the question of whether a "joint" tutorial with agreed upon facts might be possible.[1] (Lu Decl. at ¶ 5.)

As a final argument, Defendant seems to imply that it will be prejudiced because Skyhook informed Defendant of its intent to have Ted Morgan participate in the tutorial "less than thirty minutes before filing" of the Joint Statement of October 13, 2011. (*See* Def. Mot. (Dkt. 64) at 2.) However, Defendant suffered no prejudice in the filing of the Joint Statement, because Defendant had the opportunity to insert an objection to Ted Morgan's participation. (*See* Manning E-mail, Oct. 13, 2011, 7:07 PM EDT (Pl. Ex. 2); Joint Statement of Oct. 13, 2011 (Dkt. 62) at 42.)

[1] Indeed, Defendant's assertions in this regard are inconsistent. Why the parties would have "agreed" that the tutorial would be conducted by counsel is unclear, if, as Defendant asserts, the matter had already been decided by the Court.

Because Defendant has failed to provide reasons why it will be prejudiced by Ted Morgan's appearance, Skyhook respectfully requests that the Court deny Defendant's motion to prevent Ted Morgan from participating in the technology tutorial scheduled for October 21, 2011.

Respectfully submitted,

SKYHOOK WIRELESS, INC.,

By their attorneys

/s/ Samuel K. Lu

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Dated: October 16, 2011

Certificate of Service

I, Samuel K. Lu, 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) on October 16, 2011.

/s/ Samuel K. Lu
Samuel K. Lu