

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NETJUMPER SOFTWARE, L.L.C.,

Plaintiff

Case No. 04-70366

v.

Detroit, Michigan
Thursday, August 3, 2006
Magistrate Judge Whalen

GOOGLE, INC.,

Defendant

MOTION TO TAKE DEPOSITION OF RANDALL STARK

BEFORE THE HONORABLE R. STEVEN WHALEN, MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: L. PAHL ZINN (Dickinson Wright)

APPEARANCES:

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1 Detroit, Michigan

2 Thursday, August 3, 2006

3 Morning Session

4 - - -

5 (Proceedings began before recorder was turned on.)

6 THE CLERK: ...66, NetJumper versus Google.

7 THE COURT: Good morning. Appearances, please.

8 MR. HAMAMEH: Good morning, your Honor. Nabeel
9 Hamameh appearing on behalf of the Plaintiff, NetJumper.

10 MR. ZINN: Good morning, your Honor. Pahl Zinn
11 appearing on behalf of Defendant Google.

12 THE COURT: Okay. Thank you. One moment. Okay.

13 This is the Defendant's motion for leave to take a
14 -- a deposition, so Mr. Zinn, go ahead.

15 MR. ZINN: Thank you, your Honor.

16 The sequence of events leading to this motion I
17 think are fairly well and accurately set forth in our briefs
18 before the Court, so I would go to the -- to the heart of the
19 issue. We have an agreement with NetJumper for this
20 deposition of Dr. Stark. Dr. Stark is a critical witness to
21 two of Google's defenses.

22 THE COURT: He's your witness; right?

23 MR. ZINN: Yes, he is, your Honor. He's a
24 cooperating witness. He's a non-party cooperating witness.

25 THE COURT: Non-party cooperating witness.

1 MR. ZINN: Yes, your Honor.

2 THE COURT: Okay.

3 MR. ZINN: And those are -- those two elements are
4 inability -- invalidity of the patents at issue and
5 unenforceability of those patents. Google carries the burden
6 on those items.

7 The original trial date was in March 2006. Dr.
8 Stark had committed to be available live at trial in Detroit
9 March 2006. That trial was bumped because Judge Cook takes
10 our motion for summary judgment under consideration under the
11 Local Rule 16.2. All dates for trial are kicked pending
12 dispositive motions -- well, dispositive motions pending.
13 It's denied. Status conference end of May 2006. New trial
14 date is set.

15 A few weeks later we call Dr. Stark and we say, Dr.
16 Stark, new trial date, February 13th, 2007. He says can't do
17 it. Going to get a master's degree in computational biology
18 -- don't ask me what that is -- at Cambridge University in
19 Great Britain.

20 We call NetJumper and say we need to take Dr.
21 Stark's deposition to preserve it for trial. No objection's
22 made. We sent them proposed stipulation. They review the
23 stipulation and we have a call with them. They say we need to
24 --

25 THE COURT: Okay. The original deal is he's going

1 to testify in March at trial without deposition. That's fine.
2 Now he's --

3 MR. ZINN: Now he's unavailable for trial, and --

4 THE COURT: Is he unavailable?

5 MR. ZINN: Through no fault of Google's. Your Honor
6 --

7 THE COURT: Wait. How is he -- how is he
8 unavailable if he's -- they have airplanes that go back and
9 forth.

10 MR. ZINN: We submitted to our reply brief Exhibit
11 A, which is Dr. Stark's declaration, explaining exactly what
12 he's going to be doing. The trial date falls in the middle of
13 his term at his master's program. And he describes in
14 paragraph 2 -- paragraphs 2 and 3 exactly what his
15 unavailability is, and the simplest and easiest way to solve
16 this problem is to take his deposition on August 22nd as
17 noticed in Bellevue, Washington.

18 NetJumper's response misses the point. They have
19 not come up with any reason for why this is prejudicial to
20 them. The -- the purported reason is that they thought Dr.
21 Stark was an expert witness. He's been identified numerous
22 times before the close of discovery as a fact witness for
23 Google.

24 Those are all in our attachments to our brief in
25 support, Exhibit 1, our first supplemental initial

1 disclosures, he's identified as a fact witness. The
2 declaration attached to our motion for summary judgment,
3 August 2005, fact witness, and then on our witness list filed
4 in October 2005 before the close of discovery.

5 One important issue here is that since the close of
6 discovery, NetJumper has taken with our agreement five fact
7 depositions, more than they took during discovery. We've
8 alluded to one of those in our reply brief --

9 THE COURT: When did discovery close?

10 MR. ZINN: -- at footnote 2. Discovery closed
11 October 24th, 2005.

12 We're in -- we're now in a position where we had a
13 witness who was available for trial, trial date changes
14 through no fault of ours, he's overseas, he's out of the
15 United States, and all we want to do is take his deposition
16 for trial. De bene esse, preserve it for trial.

17 THE COURT: And Bellevue, Washington, I assume this
18 is where he lives?

19 MR. ZINN: Yes, your Honor.

20 THE COURT: Okay. Let me -- let me hear from Mr.
21 Hamameh.

22 MR. HAMAMEH: Your Honor, our position is relatively
23 simply as set forth in our brief. First of all I'd like to
24 address two issues raised by Mr. Zinn. First, there was never
25 any agreement on the part of NetJumper to allow the deposition

1 of Randall Stark. There's no evidence or documentation
2 evidencing that agreement.

3 Second of all, with respect to the discovery that
4 took place outside of the fact discovery phase that Mr. Zinn
5 just alluded to, I find that argument extremely disingenuous
6 and I'm somewhat appalled by it because all those depositions
7 were noticed up in June of last year. All of those witnesses,
8 according to Google, were out of the country, they were
9 unavailable. So we accommodated those witnesses being out of
10 the country, and when they returned to the country, we
11 immediately took their deposition. That's why they took place
12 outside of the discovery period.

13 THE COURT: At this point no trial date right now;
14 correct?

15 MR. HAMAMEH: Right now trial is scheduled for
16 February of next year.

17 THE COURT: February of '07.

18 MR. HAMAMEH: Right.

19 THE COURT: And you have summary judgment motions
20 pending as well?

21 MR. HAMAMEH: No. Their summary judgment motion was
22 heard and denied.

23 THE COURT: Okay.

24 MR. HAMAMEH: No -- no summary judgment motions
25 pending.

1 THE COURT: What's -- what's the prejudice to you if
2 -- if this deposition goes forward on August 22nd in
3 Washington?

4 MR. HAMAMEH: Well, the prejudice right now, your
5 Honor, is August 22nd does not work for us. We are currently
6 involved in another matter and we have depositions and a
7 expert report due that day. If there's another date that
8 would be available, we'd have no objection to that. We've
9 offered the week of August 28th.

10 Moreover, when we tried to resolve this issue with
11 Google, we told them if -- if you want an additional fact
12 discovery deposition, we want to be able to have one as well.
13 What Google is trying to do here is to unilaterally circumvent
14 the court's scheduling order by having just one deposition for
15 themselves and none for NetJumper. We didn't agree with that.
16 If they get one, we get one, or nobody gets one. That's our
17 position.

18 And they haven't showed how they would be prejudiced
19 of Mr. Stark -- or Dr. Stark's deposition doesn't go forward
20 in the next few weeks. They haven't showed how he's
21 unavailable. He -- as you indicated, there are planes, there
22 are video feed. Trial may get adjourned, he may --

23 THE COURT: Let me ask you this. In terms of your
24 unavailability on the 22nd, does it remedy your situation at
25 all if there were a telephonic deposition or a video-

1 conferencing deposition?

2 MR. HAMAMEH: On the 22nd no, your Honor, we would
3 not be able to participate in a telephonic or a video
4 deposition. We would, however, be able to do that on the week
5 of the 28th.

6 THE COURT: Okay. Thank you. Mr. Zinn --

7 MR. ZINN: May I briefly --

8 THE COURT: -- what about the week of the 28th?

9 MR. ZINN: While we would prefer the 22nd, I would
10 endeavor as best as possible --

11 THE COURT: He just said he's not available, so
12 let's -- let's --

13 MR. ZINN: No, no, I would endeavor to make him
14 available on August 31st, which I believe is the week of the
15 28th. I don't have a calendar here.

16 MR. HAMAMEH: It is.

17 MR. ZINN: Okay.

18 THE COURT: Okay. Thank you.

19 MR. ZINN: Can --

20 THE COURT: I'm going to grant your motion so --

21 MR. ZINN: I'm going to sit down then.

22 THE COURT: Okay. I'll grant the motion. The
23 deposition of Mr. Stark will take place on August 31st, 2006.
24 In addition I agree with Mr. Hamameh that fair is fair, and I
25 will allow -- reopen discovery for the purpose of taking Mr.

1 Stark's deposition and also will permit Plaintiff to take one
2 additional fact deposition. At this point it will be within a
3 reasonable time and -- and what's reasonable will be worked
4 out between the two attorneys.

5 MR. ZINN: Your Honor, would you like us to present
6 an order?

7 THE COURT: I'll -- I'll do an order and I'll issue
8 that order today. Thank you.

9 MR. HAMAMEH: Thank you, your Honor.

10 MR. ZINN: Thank you, your Honor.

11 (Hearing concluded.)

-- -- --

I certify that the foregoing is a correct transcript of the proceedings held in the above-entitled matter.

DATED: August 11, 2006

Lynn L. Simmons
Lynn L. Simmons, Transcriber