IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

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| FUNCTION MEDIA, L.L.C., | )( |
| | )( CIVIL DOCKET NO. |
| | )( 2:07-CV-279-CE |
| VS. | )( MARSHALL, TEXAS |
| | )( |
| GOOGLE, INC., AND | )( JANUARY 12, 2010 |
| YAHOO, INC. | )( 1:30 P.M. |

MOTIONS HEARING

BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM

UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: (See Attorney Sign-In Sheet)

FOR THE DEFENDANTS: (See Attorney Sign-In Sheet)

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(Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

I N D E X

January 12, 2010

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

I've got a motions hearing set in Function Media versus Google. It's 2:07-CV-279.

What says the plaintiff?

MR. TRIBBLE: Your Honor -- Your Honor, good afternoon, Max Tribble for the plaintiff. Plaintiff is ready.

THE COURT: For the defendant?

MR. GILLAM: Gil Gillam, Charlie Verhoeven, and Amy Candido for Google. We're ready.

THE COURT: All right. Several matters to take up today. The first one is the motion to seal and close the courtroom. Tell me -- the way this is ordinarily handled is that if there's some portion that comes up during the trial of the case that is -- you feel is necessary to close the courtroom, bring it to my attention, I'll do it. I'll give you a certain amount of time to, you know, identify those portions of the record that need to be maintained under seal once -- once you get your copies of the record, as well as whatever exhibits. I'll have the clerk, you know, hold the exhibits and not release the exhibits to the public for a certain after the trial, but what's the matter with that procedure?

MR. VERHOEVEN: That procedure is perfect, Your Honor. That's all we -- that's all we seek, and I will point out that the parties have agreed for direct examination purposes to provide each other with a notice the day before of the exhibits that they intend to use. And we -- hopefully we can meet and confer that evening, next morning and -- and if there is an issue, present it to you with the most efficient and nondestructive manner possible.

THE COURT: I mean, I've -- I've read the papers. My -- my concern is that -- my real concern is that my experience with this procedure has resulted in very limited periods of time that the courtroom has been closed because the courtroom is presumptively open. And what I don't want to have happen is every third question, we have an interrupt the flow of the proceedings and --

MR. VERHOEVEN: I hear you, Your Honor. We have no intent to do that, and we're perfectly happy with the procedures you've outlined and, you know, we filed -- we filed our motion, just by way of explanation, Your Honor, a few months -- a couple of months ago, I think. Hadn't exchanged exhibit lists. We just wanted to make sure that we had on the record this is a concern of ours. As long as we can work

together with the other side, I don't anticipate any problem with -- the procedure Your Honor has outlined works fine for us.

MR. TRIBBLE: Your Honor, I have to correct something that -- that counsel said. There is no agreement that we're going to identify which exhibits we're going to use on direct examination. The agreement is that we will disclose the night before demonstratives that would be used on direct examination. But there's no agreement that the parties identify either direct or cross real exhibits that have been admitted into evidence or otherwise.

But we're perfectly in agreement with the procedures that the Court has outlined.

THE COURT: Well --

MR. VERHOEVEN: I thought I was looking at an e-mail just today that said that that was agreed, Your Honor. I can double check that if you'd like. But in principle, Your Honor, the notion that we would work together and if there's something specific, we have no intention of broad objections. But if there's something specific and Your Honor will take it up and we can make a showing, then that would satisfy us.

MR. TRIBBLE: I -- I have the e-mail printed right here, and I can -- it says -- specifically the

agreement says no exchange of exhibits for any witness or demonstratives for cross witnesses.

THE COURT: Well...

MR. VERHOEVEN: I'm going to have to read this, Your Honor. I -- there may be a mistake. I thought we had reached agreement on that, but I think that's sort of a side issue --

THE COURT: Well --

MR. VERHOEVEN: Don't need to take Your Honor's time on that. If we need to, we can address the efficient handling of exhibits -- hopefully the parties can work out an arrangement there. But what Your Honor has suggested in terms of handling what we believe to be trade secret information -- to protect Google's trade secret information, we would suggest would work.

THE COURT: Well, that's -- that's the procedure I'm going to adopt. And if it for some reason becomes unworkable during the course of the trial for whatever reason, lack of agreement as to how to implement it or whatever, I'll deal with that during the course of the trial.

So I guess for the purposes of the record, the motion is granted in part and denied in part to the extent I've just outlined.

Next issue that I've got on my plate is

the -- let's take up this -- the motion to strike the errata sheets and supplement to that. I -- I've read the papers. I need to know from Google what authority exists that I can extend this deadline in -- in the manner that you've wanted me -- that you want me to extend it. Okay. I -- I've read your papers, and I've got a Fifth Circuit case that's staring me in the face that says that the rule is to be strictly enforced.

I've read Judge Schell's opinion as well in which he said under certain circumstances, namely where you disclosed what the errata was going to be and the other side didn't have an objection to it under those circumstances, that it would be inequitable not to extend the time under those circumstances. I don't have those circumstances here, so I need to know what -- what authority do you have that I can extend the -- the deadline?

MS. CANDIDO: Your Honor, I don't think we have an authority that is directly on point to this situation. However, as we -- we read the case that plaintiff has cited, it's not a hard and fast rule that there can never be extensions. And we believe in this case that it's -- with respect to Mireya Bravomalo's errata, it's essentially one business day extension because we were unable to obtain her physical signature

because it was the holiday, December 31st, and we provided Function Media with the errata in question that were relevant to the hearing on January 5th, on the 31st. And they're not prejudiced by that -- that one-day delay.

THE COURT: Well...

MS. CANDIDO: So I don't have a case directly on point, but I believe that the equities of the situation support Google's position.

THE COURT: Okay. What -- here -- here's my biggest concern is that you did -- you did supply them with certain erratas that you intended to make to her deposition testimony. I'm inclined to allow you to -- to use those in the case -- I mean, those that you had identified to them. But, you know, absent some authority where I can go beyond that and allow her to -- to then change other portions of -- of her testimony, that's what I'm -- that's -- that's my real concern here, so it's -- and I've got a -- like I said at the outset, I've got this Circuit decision. It's a published decision, but it says what it says.

And so I mean, I don't -- I feel I'm bumping up against the line allowing you to use the erratas -- those portions of the testimony that you did outline to the plaintiff even though they had an objection to, you

know, providing the signature page. That's -- I mean, I feel I'm pushing the envelope --

MS. CANDIDO: Yeah.

THE COURT: -- doing that and I need you to tell me what case authority there is out there that would let me go farther than that.

MS. CANDIDO: Your Honor, I -- I believe the authority or the principle that we would appeal to is -- is the fact that these sort of discovery matters are in Your Honor's discretion.

THE COURT: Which is my innate sense of fairness, right? I -- I --

MS. CANDIDO: You're right. I mean, on the 31st, we provided the errata that were within the portions of the deposition that plaintiff has designated from. We would have gladly provided them all of them, but we provided them the portion that they said was the reason why they would not grant the additional extension which was that they needed to know what they were for the hearing on January 5th.

And in truth this all in a sense boils down to much ado about nothing insofar as the issue here is -- I have a copy of it. It's a giant spreadsheet that was shown to Mireya. I'll grab it for a second.

It's this gigantic spreadsheet with line

after line of tiny entries where they asked her essentially what one line entry meant in this spreadsheet. And she -- the testimony is clear that she's making her best guess and so I don't believe that correcting that and relying on the accurate information -- or that our expert relies upon or otherwise is in violation or contradictory to her testimony in any way.

Her testimony is clear. She didn't know what it was, and she was making, you know, her best guess at her deposition, so ultimately this seems like an effort through some sort errata loophole to keep out the truth about what this number stands for. And I don't see any equities or -- or reason in -- in doing that.

MR. NELSON: Response, Your Honor?

THE COURT: Yes.

MR. NELSON: I know you've read the papers, so I'll be brief. The deposition was on September 16th. They asked us for an extension after the 30-day deadline had passed. We gave it to them out of courtesy. They asked us for another one. We gave it to them. They asked us for another one. We gave it to them. On the December 18th -- on the last request, we said, "Look, this is the last time. You need to have it in."

And in the meantime, of course, we filed our

motion to exclude Mr. Wagner which relies on this piece of the testimony that they're now trying to change.

So forgetting about the prejudice aspect to it, just on the merits and Your Honor recognizes the -- the Fifth Circuit is clear on this point and even the Raytheon case that Judge Schell has when there was this 96 delay -- day delay in between the deposition and the errata sheet, he said that was too late. We should a 110-day delay here, too.

THE COURT: Well, in my view, you've got a one business day delay.

MR. NELSON: Fair enough.

THE COURT: Better or worse, the deadline was extended, so that's -- I mean, that's the case that I see before me.

MR. NELSON: Fair enough, Your Honor. Well, in that case, the Fifth Circuit has been clear, and the cases that they cite where it has been allowed there has not been any prejudice to the other side. We cited in our reply brief those cases that they cite and every single one of them has this little squib that says, well, in this case, the plaintiff hasn't relied on it and there's no detriment. There's no prejudice here.

In this case, in between the time, forgetting about whether there's been extensions or not,

we put in our evidence about what Mr. Wagner had said. We have Mr. Wagner then relying on an unsworn conversation after the fact that Ms. -- about what Ms. Bravomalo said. And instead of that unsworn conversation, they now have this errata testimony.

Now, they did show only two particular part -- portions of that testimony to us on December 31st. I don't know whether that was a trick, but they certainly knew about the other parts of Ms. Bravomalo's testimony that Mr. Bratic had relied on. We had already filed our motion by that point, and they had already told us -- we had already told them, excuse me, that we were -- that Mr. Bratic at least was relying on it -- not that we're going to play it on deposition excerpts, but that Mr. Bratic was clearly relying on this testimony in his report.

And so on December 31st, they did not disclose that. They disclosed two pieces. They didn't disclose the rest of it, which, of course, we would have had an even more strenuous objection at the time. And no case -- no case has held that something not disclosed at all during that 30-day period can be -- can be added after the fact. The Fifth Circuit's been clear on that. It is an unpublished decision, but the language is crystal clear on the point.

THE COURT: Well, of course, the -- the prejudice that you identified in refusing to grant an extension was -- was what she tried to meet or he tried to meet with identifying the relevant portion of the testimony, that is, you needed to have the excerpts available in the form to present to me to rule on, correct?

MR. NELSON: Well, yes, Your Honor, but I think we also said that they were substantive changes, and we objected on those grounds, as well.

THE COURT: But the rule -- I mean, as I read the rule, it allows for substantive changes or clerical changes.

MR. NELSON: Well, I would hate to have a very quick e-mail done five minutes after their -- their submission of the errata sheet to be completely and prejudice of any other reason that might exist. We called them untimely, of course, and the -- it was untimely. And the Fifth Circuit again has stated clearly they're -- under the Fifth Circuit's rule there are no exceptions, even under what they have given us. There are no exceptions to this rule. And Rule 30(e) means what it says, which is 30 days, and that's it.

And we -- again, we are not trying to play a trick here. We gave extension after extension, and they

were still late. And it's ironic that they said that December 31st was somehow a holiday. I mean, as this Court's aware, we had to file a brief that day. It's certainly not like it was somehow -- to say that they were prejudiced because they couldn't find her on -- on New Year's Day ignores the fact that there has been 110 days before that. So I'm not -- let's not even rely on that. But I don't think we can separate out the fact they were searching -- they had 110 days from her deposition to do this, and they didn't do it.

THE COURT: All right.

MS. CANDIDO: Excuse me, Your Honor --

THE COURT: Yes.

MS. CANDIDO: -- there is one case authority. Sorry. I apologize. I overlooked this before. It's cited on Page 7 of our opposition to the motion to strike. It's Harden versus Wicomico County, 2009 West Law 4673264, from the District of Maryland from December 9th of 2009. And it notes an extension may be granted if there's some justification for the delay.

And I would also just refer the Court generally to the standard for late discovery in terms of justification for the delay and prejudice to the plaintiff. And I -- I think in that case -- in this

case there is no prejudice and the justification for a day extension is reasonable.

THE COURT: Is the witness going to be here live?

MS. CANDIDO: The current intention, Your Honor, is not to bring her live. She's essentially a witness that just explained a bunch of financial spreadsheets, and other than this one line item, it's uncontroversial between the parties. So we don't believe we need to take up the Court and the jury's time with calling her as a witness.

THE COURT: No. I'm -- I'm granting the motion in part and denying it in part. I'm granting it with respect to all portions of the errata sheet, other than those portions that you had identified to them on December the 31st. I don't find there's any prejudice as a result of that. I think that that is within the scope of what Judge Schell had identified as -- as being allowable under the rule, but I think I'm bound by the Circuit's decision otherwise and -- and I'm not going to -- to extend the deadline beyond what you've identified to them, okay?

Motion for clarification concerning Defense Exhibit is -- 213 is denied with the caveat that, you know, you need to redact those portions that relate to

post -- post-suit events.

Let's take up the motion with respect to the exclusion of expert opinions. It's Docket No. 331. It's your motion.

MR. NELSON: Thank you, Your Honor. The question here is whether Google can claim ignorance at its deposition about licensing, refuse to answer questions about those licenses, not produce any documents related to those licenses, not search the documents of the person who evidently had relevant knowledge about the licenses, and then two months later use that license agreement as a central focus. We're talking about the Meyer agreement now -- as a central focus of their damages report.

And I want to talk primarily about Carl Meyer, the Carl Meyer agreement, because the Carl Meyer agreement is a central focus of -- of their damages report, and it's illustrative of the other issues with respect to Mr. Chen saying, "I don't know, I don't know, I don't know," and refusing to give testimony and then Google having Mr. Ben Lee come in and talk to Mr. Wagner about it and give testimony inconsistent with these "I don't know" answers.

Google states in its reply that our side was somehow dishonest in our presentation of the issues

here, and I want to spend, if it's okay with you, just a few minutes going over the undisputed facts of what the record shows, how Mr. Chen stated "I don't know" repeatedly over a hundred times in his deposition.

We filed our 30(b)(6) notion -- notice or gave the other side their 30(b)(6) notice on -- in April of 2009. In June or July, they told us that Johnny Chen would be their corporate witness on licensing issues. One week before the deposition, they amend -- let me just hold there -- and do we know why this -- let's see --

THE COURT: We don't know why, but -- give him some help, Mr. Warriner.

MS. CANDIDO: It might be because the projector is projecting on top of what you're displaying on the Elmo.

MR. NELSON: I apologize, Your Honor.

THE COURT: There we go.

MR. NELSON: This is our relevant corporate witness 30(b)(6) notice. This is Exhibit A to our motion and also to our reply. If you look, for example, at Item Topic 25, from 2002 to the present, Google's evaluation of patents or other technology -- or proprietary technology related, internet search, internet advertising or accused products and the

methodologies used by Google for determining values or royalty rates for licensing of such technology.

Mr. Chen was also the designated witness on Topic 24 above it, Topic 26 below it, and Topic 27 right below that one, as -- as well as one on the other page. There's no dispute about that. And, in fact, there's no dispute that this Meyer agreement was specifically called for by the notice.

And I'm going to show you what is marked as -- this is the third supplemental response and objections to our interrogatory responses, and this is their responses. This was done the day before Mr. Chen's deposition. And the topic, Your Honor, was identify every license agreement to which you are a party to the extent such license agreement covers patents or any other form of intellectual property and relates to any feature of the accused product.

They had filed responses. In their very first response, they've identified this -- we'll represent and they're not going to dispute, that the relevant license was in this very first response and this Bates number.

In addition, they identified a separate copy of the license agreement which is in this last Bates number that was amended the day before Mr. Chen's

deposition, September 8, 2009.

In addition, they got it verified by none other than Mr. Chen himself. This is the verification from Mr. Chen on these interrogatory responses, dated the day before his deposition, stating that he had reviewed it and that he was verifying the supplemental response to our interrogatories.

We then asked him questions, and as this Court is aware, he could not answer basic questions about any of these licenses or most of these license agreements. He could not answer any questions about the Meyer agreement. He did not consult -- in his testimony, he state that he did not consult with Ben Lee or other people in preparation for his deposition. Instead, he was just giving "I don't know" answers. And he did testify that his answers -- he understood these answers to bind the corporation here.

And we deposed Mr. Chen over and over and over again, he stated "I don't know." He did not know what the technology was here. He did not know what the circumstances were of the transaction. He did not know how they evaluated the transaction. He didn't even know who Carl Meyer was. All he did was read off the title of -- the address of what he had at -- on the face of the license agreement.

And if I may, Your Honor, we have it on videotape, the relevant excerpt. It's about two or three minutes long, and it's -- it's the Meyer excerpt that Mr. Chen has. And if it's acceptable to you, we can play that.

THE COURT: That's fine. I've read his transcript.

MR. NELSON: Okay.

THE COURT: You can play it if you want to.

MR. NELSON: Yeah.

(Videoclip played.)

Q. Have you seen this document before?

A. Yes, I believe so.

Q. What technology is involved in this patent purchase and sale agreement?

A. This copy is very hard to read. I believe this is a patent purchase and sale agreement between Google and Carl Meyer, M-e-y-e-r, for three patents and two patent applications.

Q. What technology is involved in the patent purchase and sale agreement?

A. I can read you the title of the patent.

Q. I don't want you to read the title of the patent. I want you to tell me off the top of my head -- off the top of your head, without looking at it, if you know,

what technology was involved?

MS. CANDIDO: Objection.

A. So the first patent is Method, Algorithm and Computer Program For Optimizing the Performance of Messages, Including Advertisements in an Interactive Measurable Medium. The second is System and Method for Improving the Performance of Electronic Media Advertising Campaigns Through Multi-attribute Analysis and Optimization. And the third patent is Method, Algorithm and Computer Programs For Optimizing the Performance of Messages Including Advertisements in an Interactive Measurable Medium.

And then the two -- the two applications are system and method for improving the performance of electronic media advertising campaign through multi-attribute analysis and optimization and method, algorithm and computer program for optimizing the performance of messages including advertisements in an interactive measurable medium.

So it seems that these patents are related to the algorithms and methods and computer programs -- algorithm, methods, and computer programs.

Q. How did this patent portfolio come to your attention?

A. To my personal attention?

Q. To Google's attention?
A. I do not know.
Q. Can you tell me anything with respect to the circumstances of how Google purchased this patent portfolio?
A. You mean how this came about in the first place?
Q. Yes.
A. Is that your question? I don't know.
Q. Did Carl Meyer -- who is Carl Meyer, first of all?
A. Carl Meyer is an individual residing in 20252 Hill Avenue in Saratoga, California.
Q. Besides that, you don't know anything about who Carl Meyer is?
A. He appears to be the owner of these patents.
Q. Besides what is on the face of the agreement, can you tell me anything else about Carl Meyer?
A. No.
Q. Did Carl Meyer threaten to sue Google?
A. I don't know.
(Videoclip ends.)
MR. NELSON: Your Honor, this was also not the first time that Mr. Chen had been asked about this very license agreement. This is the -- his testimony from -- this is in the record. This is his testimony

from the Aloft case which was taken after our 30(b)(6) notice -- four months before his actual deposition in this case which he affirmed -- he said he stood by his testimony in that case. And, again, he stated that he did not know -- he did not know anything about these agreements. "Do you know why Google wanted to purchase these patents and applications?" Answer, "No." This is at top of 186. "Do you have any idea what technology or field they covered?"

From the sum of the patents you can get an idea, based on the title of the patents, which is what he did in this case, as well.

"Do you know if Google uses the technology in these patents in any of its products currently?"

"No, I don't know that."

And then it goes on. And in those answers, both in the Aloft case and in this case we tried to elicit from him any of the details that would give us any reason to believe that they intended to rely on this license, the circumstances, the technology -- when we asked him about the technology, you saw it, literally all he did was read the title of the patents and that was it.

And what is the technology. He picked it up, and I asked him, not just what it says, what is the

technology. And all he did was read from the patent itself.

Well, two months after the deposition, Mr. Wagner made the Meyer agreement a central focus of his damages report. He does not rely on Mr. Chen or his testimony in the least. He doesn't cite it in that section at all. Instead, he's forced to rely on Ben Lee and Mr. Lanning, who -- to give opinions on what the technology is that Mr. Chen could not give.

And Google now states, well, Mr. Lanning is free to testify about this because Mr. Chen did not talk about the technology, but as Your Honor just saw and as we can put up again, we were asked specifically what was the technology. We asked him, and he said all he could do was read from the patents. He gave us no reason at all to think that there is anything else going on. We could not cross examine Mr. Chen's opinion on this, nor can we cross examine Mr. Wagner because all he does is rely on Mr. Lee to talk about what the patents cover.

And Mr. Wagner in his report and in his deposition specifically states that he is relying both on Mr. Lanning and on his conversations with Mr. Lee about what the Meyer patents do.

If this license was as important as Google now says, if Google had practiced the technology, one

would think that having been warned about this four months previously in the Aloft deposition, having its expert report due approximately a month at the time from his deposition because trial was still in November, that he would be able to say what the technology covered, but he didn't. All he said was "I don't know, I don't know, I don't know."

At the time of Mr. Chen's deposition, as I talked about, the damages report was due about a month later. And then a month after that, after the extensions and -- and the trial push, November 25th, Mr. Wagner submits his report and all of a sudden the Meyer agreement becomes a central feature of the license. But we can't cross examine him on that point.

And Mr. Lanning testified what the technology covered, but Mr. Chen again could not even state what the technology was, let alone what it covered. And amazingly, Your Honor, in this case -- in this response they've submitted another affidavit from the now ubiquitous Ben Lee to support their position. But this affidavit is notable for its silence. What were the circumstances of the transaction? Were there claim charts exchanged? How did this come to Google's attention? How are we to expect that out of the many patents that Google might choose to license or purchase,

somehow this came to Google's attention?

We put in our original briefing something in the public record that suggests there is some type of connection between Mr. Meyer and Google, and we have no way to cross examine any of Google's witnesses about that. They have not produced Mr. Lee's documents. They have not produced a single document about Carl Meyer's report or -- excuse me, the Carl Meyer license at all. All we have is Mr. Wagner relying on Ben Lee and then Mr. Lanning who is directly contradicting what Mr. Chen did.

This reliance on Meyer, after they've denied us discovery on this point, has caused severe prejudice to us. Again, we have no way to cross examine Mr. Wagner on this point. We have no idea of the circumstances behind the deal. We do not have the documents to test whether Mr. Wagner or Mr. Lanning is right on this issue. And indeed, they have not searched the files of the witness with what -- now they claim is the most relevant knowledge about this transaction. We don't know whether there is a design around available. And most fundamentally, we do not know why Google purchased these patents.

Mr. Wagner and Mr. Lanning literally have to create facts to fill in the holes of Google's discovery.

Such a methodology is inherently unreliable, as even Mr. Wagner stated in his own testimony. He said, Your Honor, that he has never relied on sworn testimony -- excuse me, unsworn conversations that contradict sworn testimony.

In Google's sur-reply they state, well, this is just relying on hearsay evidence, but this is not so. This is -- there's nothing -- of course, experts can rely on conversations, but what they can't do is rely on later unverified, unsworn conversations that contradict the sworn testimony and when Google has prevented us from taking discovery on this issue.

Google points out Mr. Bratic's conversations with Mr. Dean on this point, but we produced all of Mr. Dean's documents. He was available for deposition, and Google had the opportunity to cross examine Mr. Dean on these very points. We didn't have that. It's not a matter of can you rely on hearsay. It's can you rely on hearsay that is directly contradicted by sworn evidence. And, again, Google has not cited a single case anywhere that has allowed an expert to testify in situations that are directly contrary to sworn testimony. And that's what -- exactly what we have here.

Mr. Wagner, again, perhaps for this reason has admitted that it's not accepted methodology to rely

on these unverified conversations when there is sworn testimony on this topic. Google wants to use this agreement as a comparison with the patents --

THE COURT: Well, now wait, hold on just a second.

MR. NELSON: Sure, sure, sure.

THE COURT: I mean, you say it wasn't an accepted methodology, or you say he hadn't ever done it before?

MR. NELSON: He said that he has -- I'll put it up. He said he had rarely, if ever, done it before.

THE COURT: Okay. Well, if I had a situation, for instance, where sworn testimony was obviously mistaken and later unsworn testimony or unsworn statements came in to clarify that, are you saying it would be unreliable or an unaccepted method -- if they get the date wrong on an agreement, it's too far removed from the date of the hypothetical negotiation? I can envision a number of hypotheticals that come to mind. And somebody says, "No, we -- we entered that agreement in 2001 and not 2010" --

MR. NELSON: Well --

THE COURT: I mean, the expert is then under your theory bound to what the sworn testimony was even if it's plainly just a mistake?

MR. NELSON: Well, Your Honor, two responses. First, I want to answer your direct hypothetical, but, second, let me just point out that's not what we have here. But in that circumstance, at the very least, we should have the opportunity to cross examine any mistake which we do not have here. And second, this is not -- put -- putting aside, Ms. Bravomalo, which they're saying this is an innocent mistake, this is no innocent mistake with respect to the licensing technologies. They have -- they were prepped. He signed the verified interrogatory the day before. They knew these questions were coming, and they made a conscious decision to deny us discovery on this by answering "I don't know." That is substantially different from making some -- some statement that could be contradicted or whether that's reliable in any particular instance if they make a mistake on a date.

Look, I mean, you're probably -- of course, Your Honor, if -- if they're making some clearly transact -- you know, some mistake in what a document says or something like that, and -- and we are able to cross examine the witness about that mistake, then that is an entirely different situation and is standing here right now very well -- almost certainly would be admissible, but that is not the situation.

THE COURT: Well, I'm -- no, I'm just trying to get away from arguing extremes because you're saying it's inherently unreliable to do that, and it's -- and it really isn't, okay, from my view.

Now, that's a different question. If they denied you discovery and -- and violated the 30(b)(6) obligation, that's a different issue.

MR. NELSON: Yes, sir.

THE COURT: I can deal with that, but let's -- you know, let's focus it on what the argument really is.

MR. NELSON: Yes, sir. Well, fair enough.

And -- and I think what the argument really is is that Google is trying to get in testimony through the back door when they should have given us the testimony through the front door, namely the 30(b)(6) testimony. And not only the 30(b)(6) testimony, but the documents, the circumstances, searching the witness's files to show what they -- what Wagner now claims is true really is true.

And we have no ability to cross examine them about this. We can't point to documents. We can't point to testimony besides saying, "Well, your corporate witness said, 'I don't know.'" But we can't ask Mr. Wagner that question. I mean, it's -- we could, but

it's highly ineffective when you're asking someone who's relying on hearsay to talk about, well, their witness changed testimony. We have to ask -- to be anywhere marginally effective, we have to ask the person who actually gave the testimony about why they changed. And we can't do that.

Not only that, we don't have the basis in the record here because Google hasn't produced anything to talk about what happened with the Meyer agreement or any of these other licenses, about why Google signed this Meyer agreement, what the circumstances were.

And they submitted again the sworn affidavit from Ben Lee talking about there was no threat of litigation, but that -- as you know, Your Honor, that means completely different things to different people. And were there claim charts? How did this come to Google's attention? Were there related parties? All those questions are -- are up in the air, and we have no ability to cross examine them.

Let me just briefly, because I know I'm going long a little bit, let me just briefly talk about a couple of the other issues. With Mr. Zoufonon, of course, there's the technology charge. We asked him these same questions. He said the same "I don't know"-type answers.

With respect to the Stanford-Google license where Mr. Wagner has stated that he was not following any -- he was applying what he admits is a new methodology. He says he's taking what is applied in the valuation field and then turning it into -- taking a percentage-based license and turning it into a royalty. And he admits that no one has ever done that before. There are tons of licenses, Your Honor, that are percentage-based licenses, and no one has ever done that before.

And Google's point is that, well, the first step of the methodology is accepted, and that's true. But that's like saying, "Well, gravity is an accepted principle, and, therefore, we're going to make the conclusion and apply it to earth and think that earth is the center of the universe." It's that second step that is not reliable.

And in this case, nobody has taken a -- a percentage-based license and tried to turn it into something that it's not, namely some type of royalty-based license.

So with that, if there are any questions on any of the issues -- thank you, Your Honor.

THE COURT: I don't have any questions.

MS. CANDIDO: Your Honor, the Court should

not exclude Mr. Wagner's opinions with respect to the patent licenses that Mr. Nelson was just discussing. Mr. Wagner does not rely on Mr. Lee's testimony. I can show you each of the citations with respect to the Carl Meyer agreement, and Mr. Wagner cites his conversations with Mr. Lee as further support for his opinions, but in each case, those opinions are supported by other evidence, as well.

In particular, it's supported by the Carl Meyer agreement itself. There is an agreement, the expert has read it, he is relying on its terms, on its face, and that is essentially supplemented, if anything, by the expert opinion of Mr. Lanning.

Mr. Lanning is Google's technical expert who was asked to provide expert testimony on a technical issue, namely the patents at issue in the Carl Meyer agreement and what they cover and how that relates to Google's products. That's squarely within the realm of the type of technical expert opinion that one would expect an expert to provide. And it's standard practice for one expert to rely and incorporate the opinion of another expert.

And Function Media can't claim that that's untimely or in any other way improper. It was provided in accordance with the normal expert discovery schedule,

and Function Media has whatever rights it has to ask Mr. Lanning about his opinions in that regard.

Mr. Wagner cites Mr. Lee for only one other point which is Google's practices and preference for a lump sum license. That's obviously out with respect to Your Honor's prior offer. But Mr. Wagner also relies directly on Mr. Chen's testimony which he quotes at length in his report.

So even if there was somehow impropriety in relying on those conversations, it's not -- those conversations are not necessary to the expert's opinion.

In addition, it's not -- there's -- there isn't anything wrong with relying on conversations that are untested and unsworn as -- as Function Media characterizes them. As the Court is well aware and Mr. Nelson agrees, experts may base opinions on inadmissible evidence and hearsay and Courts routinely find that. And as they acknowledge, Function Media's expert relies on later unsworn conversations. Those are of a witness who was earlier deposed, but they are revealing of conversations that we didn't have any knowledge of at his deposition to ask him about. So we're equally unable to test and probe the conversations Mr. Dean had with Mr. Bratic because they took place after his

deposition.

I also want to turn the Court's attention, in particular, to a case that's cited in our sur-reply. It's the Houlihan Lokey versus protective group case from the Southern District of Florida in 2007. In that opinion, the Court refuses to exclude an affidavit because, quote, there is no inherent inconsistency between the affidavit and the prior Rule 30(b)(6) deposition testimony inasmuch as the affiant does not directly contract the deposition -- the deponent's testimony, but attempts to fill in the evidentiary void.

And while Function Media likes to consistently characterize this as contradictions, what's clear from the -- the snip they played, this -- this is not Mr. Wagner saying it's not a -- not a settlement agreement and Mr. Chen saying it is a settlement agreement. Mr. Chen said he doesn't know. And Mr. Chen's inability to provide certain details does not prohibit Mr. Wagner from reading the agreements and forming opinions based on the terms of the agreements.

Rule 30(b)(6) does not, quote, absolutely bind a corporate party to its designee's recollection. That's from the A.I. Credit versus Legion Insurance case from the -- the 7th Circuit in 2001.

And Mr. Nelson says there's no authority for

allowing someone to rely on inconsistent testimony. I actually don't, as I said, believe this is inconsistent, but I want to point out that the Whitesell versus Whirlpool case from the Western District of Michigan from October 30, 2009, states, quote, although testimony of a 30(b)(6) designee may be binding on the corporation, the Court does not agree that 30(b)(6) testimony precludes the introduction of all other evidence that relates to the designee's testimony, inconsistent or not.

And, of course, here, that's exactly what we're talking about. They're trying to preclude all evidence with respect to the Carl Meyer agreement, apparently even the agreement itself, simply because the 30(b)(6) witness was unable to answer questions about it at his deposition. Of course, the 30(b)(6) witness will be available to Function Media at trial. They can cross him then. And if there are inconsistent statements, I'm sure they will -- they will bring those to light.

Again, our brief goes into detail in the case law about Rule 30(b)(6) testimony being evidence which like any other testimony can be contradicted and used for impeachment purposes.

THE COURT: Tell me, other than the terms of the written Carl Meyer agreement, what else was Mr. Chen

prepared to give testimony about with respect to that agreement?

MS. CANDIDO: Your Honor is testing my recollection at this point. Mr. Chen was prepared to give testimony about the Carl Meyer agreement terms. You know --

THE COURT: Other than the written terms of the agreement, what -- I mean, you defended his deposition, correct?

MS. CANDIDO: Yes, I did.

THE COURT: All right. Now, I need you to tell me what else he was prepared to give testimony on other than the written terms of the agreement.

MS. CANDIDO: He was able -- he was prepared to give testimony about how that agreement supports and is evidence of Google's practice and preference for entering into lump sum or fixed fee license or patent purchase agreements, as opposed to running royalty agreement.

He was also prepared to -- to give testimony that the -- the lump sum in question of -- I think it's $3.5 million is representative of the -- the types of -- of volume of money that Google's willing to pay for patent licenses and -- and not hundreds of millions of dollars. So I think -- those are minute details, but

essentially how the -- the license -- the purchase agreement fits into Google's patent practices and policies generally.

And I want to point out, Mr. Chen was not prepared to provide detailed testimony about all of the circumstances surrounding that patent license because that was not a topic on the notice. It would have been easy for Function Media to say the circumstances surrounding the entry of, you know, Google's decision to enter into patent license agreements, including its evaluation of the technology in those agreements, whether they cover any products. I mean, they could have asked those detailed questions, whether in interrogatories or in the notice, or Mr. Nelson could have easily sent a letter and said, "Hey, this deposition, Mr. Chen couldn't provide these details. We need them. Provide us with another witness." That happens all the time, and we would have gladly done that. But Function Media never did that. Instead, it's trying to exploit the 30(b)(6) witness's lack of knowledge as a sort of gotcha for Google.

When we had been -- and as Your Honor knows, we've offered Mr. Lee to supplement that. We would also offer Mr. Chen again and make another attempt at educating him, or another witness if that's what -- if

that's what they wanted, but they never asked for it then or -- or now.

But the focus of this motion is a Daubert motion against Mr. Wagner. And it's certainly not unreasonable to rely on the terms of an agreement and another expert's testimony that's well within the scope of that expert's expertise --

THE COURT: I --

MS. CANDIDO: -- which is what Mr. Wagner relies on.

THE COURT: -- I understand and that was -- the point of my questions to your colleague on the other side is as I read this motion, what they're after is an order barring reference to the Carl Meyer agreement and others because of a failure to comply with Rule 30(b)(6) and allow them discovery about the circumstances surrounding the execution of a license agreement, whether it was under a threat of litigation, who the parties were, what drove the transaction, and all of these other things.

And so to me, I've got to jump through a couple of hoops. One, I have to decide whether or not you complied with your obligations under Rule 30(b)(6). Second, if I find that you didn't, then what affect that has on your expert's ability to rely on the Carl Meyer

agreement for purposes of expressing his damages opinion.

So those are -- that's how I read --

MS. CANDIDO: Right.

THE COURT: -- the motion regardless of whether it's styled as one under Daubert.

MS. CANDIDO: Well, and I would point out that -- that Function Media has no authority for the proposition that an expert can't provide testimony on a subject if the 30(b)(6) witness on that subject was unable to provide full and complete testimony, even if that was the case, and I don't agree that that's the case with respect to the topics in question here.

And, in fact, I think the authority that we've cited suggests that you can have testimony that's inconsistent with the 30(b)(6) notice -- 30(b)(6) witness's testimony, especially where that is supplementing a lack of knowledge, filling in an evidentiary void, for example.

And import -- it's important to note with respect to the Carl Meyer agreement, in particular, you saw the questions that Function Media asked him. They didn't ask him why Google wanted to purchase the Carl Meyer patents. They didn't ask if Google uses the technology in the Carl Meyer patents in its products.

And those are the subjects of the -- Mr. Wagner's reliance on Mr. Lanning. They didn't ask those questions.

They can't now try to say he should be precluded because this shows he wouldn't have known the answers to those questions. They have to ask the questions. And whether those questions were asked or not in the Aloft Media case is irrelevant. That's not a 30(b)(6) corporate testimony in this case. It's from a different case. It's not binding here. And, you know, for all they know, he might have gotten educated on those topics in between the interim period.

THE COURT: Of course, they had asked similar questions about other agreements in this case, though, hadn't they not?

MS. CANDIDO: I think there's a -- there's a smattering of instances where sometimes they did, sometimes they didn't.

THE COURT: But your -- and your witness testify that he didn't know --

MS. CANDIDO: With respect --

THE COURT: -- he relied --

MS. CANDIDO: -- to some licenses, he did have more knowledge on the circumstances of those licenses. I mean, obviously, in the VoiceAge, one in

particular comes to mind because it's one that Mr. Chen was himself directly involved in, but there were -- there were others, as well.

THE COURT: Well, just so I understand the -- the -- the record, do I understand that there was no effort made to educate the witness on the circumstances surrounding the execution of the Carl Meyer agreement?

MS. CANDIDO: That's accurate because we did not know that that was something that they were interested in having him educated on.

THE COURT: Okay. And there was no effort made to educate the witness with respect to, for instance, who Carl Meyer was, other than what was on the term of the agreement -- in the terms of the agreement?

MS. CANDIDO: No, Your Honor, I mean, I don't -- standing here today, frankly, I don't understand the relevance of who Carl Meyer is. The license agreement, you know, states he's an individual that resides at a certain address and he sold these patents to Google. There -- I don't understand how that would even be relevant.

THE COURT: Well, it was argued there might be some relationship between Carl Meyer and Google and they wanted to test whether it was an arm's length

negotiation or not.

MS. CANDIDO: That would have been an appropriate question, Your Honor, in my opinion, and that was a question that was not asked of the witness. I believe the witness would have been able to answer that question because there are other agreements within the license agreements that are specifically not arm's length transactions that are with employees who developed technology sort of on the -- during their time at Google or while they were still at Google and Mr. Chen was knowledgeable that those were with employees and knew that this agreement does not fall in that category.

And Function Media, I think, cites in their opening brief in a footnote that there's an individual named Eric Kay who they assert was an employee of Google. The response to that is a couple. First off, Mr. Kay is a co-inventor on one of the patents that is addressed in the Covenant Not To Sue. It's not -- he's not involved in the patents that are at issue in the Carl Meyer agreement itself, to my understanding.

And secondarily in any event, Google had checked its HR records, and they have no record of an individual named Eric Kay being employed by Google. And to the extent that he has a resume on the web implying

otherwise, their best understanding of that is that there are people in the world who represent themselves as being essentially Google-trained optimization specialists, people who can help you make your ads better for Google, but they're not employed by Google. They just sort of hold themselves out as having that expertise. And that's the best guess in terms of the explanation for Mr. Kay's web representation, but he is -- HR has checked and he was never an employee of Google.

THE COURT: Well, the question that was asked -- getting back to Carl Meyer, was besides what is on the face of the agreement, can you tell me anything else about Carl Meyer and you answered -- he answered no.

MS. CANDIDO: Well, Your Honor, I think that question doesn't fairly zero in on is Carl Meyer -- you know, does Carl Meyer have a business -- I mean, does he have a relationship with Google, was he ever employed by Google.

THE COURT: No, it was very general. Can you tell me anything about him? And he said, "No." I mean...

MS. CANDIDO: Okay. I mean, my -- my interpretation of that question would not have been to

recite a negative, which is to say, "Do you -- do you know anything about Carl Meyer?" "I know he's not someone with an arm's -- you know, with a close relationship with Google." It just -- that doesn't seem like a natural response to a question like that.

If they wanted to know if he had a relationship with Google, Mr. Nelson's obviously a very sophisticated deposition taker, and he certainly could have asked that question. He asked many, many questions --

THE COURT: Okay.

MS. CANDIDO: -- to cover his -- his bases. I don't know if Your Honor would like me to address any of the other issues --

THE COURT: I would, yes.

MS. CANDIDO: Okay. Beyond the Carl Meyer agreement. Okay.

THE COURT: Yes.

MS. CANDIDO: You know, the -- the points with respect to the some of the other license agreements that they point to are the same about -- that we've just gone through with -- with Mr. -- the Meyer agreement so I won't repeat them here.

Mr. Wagner's testimony relying on a conversation with Ms. Bravomalo should not be excluded.

We've gone through that. He had a -- he spoke with her. She clarified that line entry, and she's attempted to clarify it for Function Media, as well.

Function Media's arguments with respect to Mr. Wagner's opinions on acquisitions. I think they seem to have somewhat dropped these, because as we pointed out, their -- their issue seemed to be that Mr. Zoufonon, Google's corporate representative on Google's acquisitions, didn't have knowledge about Google's acquisition policies, and we pointed out they never -- there's nothing in that topic calling for what are Google's policies with respect to acquisitions. And in any event, he provided fairly detailed questions about Google policies regarding acquisitions, specifically that they have never done it to acquire patents.

The other issues there are this goodwill and technology charge. Those are very detailed accounting issues from Houlihan Lokey reports. That's not something within the scope of the 30(b)(6) topics either. He did his best to answer those questions, but in any event, the experts rely squarely on the documents themselves, the Houlihan Lokey reports which explain the bases for those calculations. And it's not contradicted by anything that Mr. Zoufonon said.

The Carl Meyer and IBM agreements are not litigation settlement agreements. We submitted a declaration from Mr. Lee, as Mr. Nelson noted, that explains that those are not litigation settlement agreements.

In addition, I think if -- if one examines the Carl Meyer agreement and the Covenant Not To Sue, it's pretty clear that they're not related. The Covenant Not To Sue contains a promise by Google not to sue on patents that it didn't even own until entering into the purchase agreement. So clearly Google's Covenant Not to Sue there can't be related to the subject of litigation threat. They didn't own the patents before.

Similarly, it contains a promise by Carl Meyer not to sue on an entirely different separate family of patents from -- from the purchase agreement. So the fact that Carl Meyer would agree not to sue Google on some Family B doesn't speak to whether Family A was the subject of a litigation threat in any way. And they're trying to suggest that that Covenant Not To Sue is -- sort of prima facie establishes that the sales agreement is a litigation agreement, and that's just not the case if you look at the agreements.

In particular, the Federal Circuit has noted

that a license amounts to no more than a Covenant Not To Sue by the patentee. And, again, we are -- our reply brief makes it clear that it's Function Media that bears the burden of proof on this issue, that the burden of -- burden of proof for the -- to show the inadmissibility of a compromise is on the party objecting to the admission of that document.

Mr. Wagner's valuation of the Google-Stanford license agreement, it applied widely accepted finance theory. Mr. Wagner takes as a starting point a well-established approach for estimating the value of a company's equity, and that equates the value of the equity to the value of -- of future cash flows to the equity holders and then he applies that to deduce that 2 percent equity in Google is equivalent to a right to 2 percent of future cash flows of Google.

And then from there, the rest of his calculation is basic math. He converts the 2 percent of cash flows into a percentage of revenue based on Google's actual profitability. And that -- that calculation itself may be new, but as we point out in the Galloway versus Big G case, it's okay to admit an expert's opinion when the methodology used is accepted, even though there's no evidence that the specific model established by the expert had ever been developed in the

past.

Function Media's final criticism of -- of Mr. Wagner's treatment of the Stanford agreement is that it -- it changes the terms of the agreement from a percentage of equity into a -- a royalty and -- but Mr. -- Function Media fails to point out that their own expert, Mr. Bratic, turned the equity grant into a purchase -- sorry, a lump sum amount by applying the percentage of equity inferring what the va -- based on the current market value of that equity that Google would have been willing to pay, you know, this very large number to Function Media as a license agreement. So Mr. Bratic sort of converted it in its form.

And in response to that, in rebuttal, Mr. Wagner says, "You haven't looked at it the right way. Here's my way. I've converted it in a different way." They're -- they're both doing the same thing and relying on established methodologies.

And if you don't have any questions --

THE COURT: I -- I do --

MS. CANDIDO: Okay.

THE COURT: -- have another question.

Topic in the 30(b)(6) notice that -- Topic 24 is license agreements and royalty agreements related to internet search, internet advertising for the accused

products that Google or its affiliates or assigns has entered into from 2002 to the present. That's the noticed topic.

What is your view as to Google's obligation to -- what steps are necessary to prepare a witness to testify as to that topic?

MS. CANDIDO: I think that the witness has to have knowledge of what Google's license agreements and royalty agreements relating to those subject areas are from that period of time.

THE COURT: Does -- does it require anything beyond the written terms of the agreements themselves, or does Google just have to identify someone who can read the agreements?

MS. CANDIDO: Well, I think that it's not simply someone who can read the agreement. It's someone who can speak to the terms of the agreements and perhaps explain, you know, how the terms interrelate to one another. These agreements are not always the most simplistic things on their face. And -- but I don't think that it calls if for the -- whether these -- these license agreements are entered into under the threat of litigation, what the technology at issue in those licenses are, whether Google practices the technology.

I think a very valuable comparison, Your

Honor, is to look at Topic 30 of this exact same notice. That's their acquisition related topic. Clearly, they have the knowledge to tell you what is necessary when they want to. This goes on for, I don't know, numerous -- half a page or more about Google's acquisitions of technologies, including but not limited to acquisitions or mergers, dah-dah-dah, including a description of amounts paid for any such acquisition, any analyses performed by Google or third parties forming a basis for said amount, a description of the circumstances surrounding the acquisition, a description of the acquired technologies, any intellectual property held by the acquired company, and the analysis related. I mean, it goes on and on.

If that had been attached to the license topic, clearly that would have been called for and we would have had a witness prepared to address that. That's not what they asked for.

And -- and, frankly, Your Honor, had they said after the fact, "Hey, you didn't provide us with all of this information, despite it not being here, we want it, we would have given it to them." But they never asked because their interest here was not to get at the information. It appears to have been an effort to try to foreclose us instead. Thank you.

MR. NELSON: Reply, Your Honor?

THE COURT: Yes.

MR. NELSON: As Your Honor points out, it is Topic 24, it's also Topic 25, which is from 2002 to the present, Google's evaluation of patents or other proprietary technology relating to internet search, internet advertising, or accused products and the methodologies used for Google -- by Google for determining values or royalty rates for licensing of such technology. That by itself has to go beyond the terms.

And just to be clear, let's look at what Google said on -- when it said what witness it was going to have for this -- for this notice.

Matt, could we put that up? Could we go to page 22?

This is -- this is, Your Honor, is the documents -- this is their objection, saying what witnesses they're going to put up. If you zoom in the first full paragraph, this is Topic 25. Subject to Google's objections, Google will produce a witness to testify regarding the ads-related license agreements produced in this litigation that are admissible at trial. It didn't say it was somehow limiting this to the terms of the ads-related license agreements. It

said they're producing a witness regarding the ads-related license agreements produced in the litigation that are admissible at trial.

Let's go to what they said they're going to do for Topic 25. Objection, objection, objection. Next page. Top of the next page. Google will produce a witness to testify regarding the ads-related license agreements and acquisitions produced in this litigation that are admissible at trial. This is exactly what we expected.

We asked the questions, and Ms. Candido stated that we didn't ask the specific questions. I don't know -- Your Honor, we have a seven-hour limit. We've gone on a deposition. He says, "I don't know, I don't know." "What's the technology?" "I can read you what's in the patent." "Can you tell me anything else?" "No." "What are the circumstances?" "I don't know." "Who is Carl Meyer?" "I don't know." "Can you tell me anything about Carl Meyer beyond the face of the document?" "No."

To say that we -- there have -- for every single one of these we have to ask every single question when he's made it clear from these answers that he knows nothing about these agreement. And Ms. Candido I believe just conceded that he was not prepared to talk

about the circumstances of these agreements. He said he wasn't prepared to talk about that. He was prepared to talk about whether it's a lump sum. He was prepared to talk about how it supports the -- the price of what they want in this case, but he didn't talk about the circumstances.

And he clearly was -- it's belied by the VoiceAge agreement which is what they're using as an example for what he did testify to. In that one where he does have personal knowledge, he went out and he said, well, this happened and this happened and then I talked to the financial management group, and, et cetera, et cetera, et cetera. But he did not go out and educate himself about these license agreements.

And what is the point of taking a 30(b)(6) deposition if the expert is then able to rely not on the 30(b)(6) deposition but on hearsay that comes in that is completely contradictory where we have been denied the chance to take discovery on this?

And, again, it's not just about the -- the 30(b)(6) deposition. They have produced not a wit of documents about this, not anything about the Carl Meyer agreement or any of these other ones that would -- that would go into why they had this sale. So at a minimum, Your Honor, we think that it's -- it's highly justified

to exclude it completely here with respect to Carl Meyer.

And by the way, we don't have an object -- if they want to talk about Carl Meyer and what it actually -- the terms of the agreement and says, "This says it's a $3.5 million agreement," we have -- we have no objection for reciting the terms of the agreement. That is -- that is not what we're trying to exclude here.

What we're trying to exclude is what Mr. Wagner does, which is to go beyond a step that and say, "Well, I've relied on Mr. Lee, and I've relied on Mr. Lanning and not only are these patents -- do they exist, but they are so core to Google that they are a great representative of -- of what these patents are in this case. And so, therefore, based on a lot of other factors, as well, but, therefore, I have a really low amount for what I'm going to conclude based in large part because of these Meyer patents." When we haven't had any opportunity to take any discovery about that and when we asked the questions and the only response is, "Well, we didn't understand your notice that it was going into circumstances," when I don't know how we could have been more clear on this about license agreements relating to internet search in the accused

products, the evaluation of patents, how does one evaluate except if you're talking beyond the scope of the terms itself?

And so unless Your Honor has more questions about -- about the Meyer agreement, I want to just hit briefly the settlement agreement which is -- on Carl Meyer, again, there is prima facie evidence here that is litigation related, that Mr. Zoufonon in his deposition says all patent acquisitions, which this was, goes through the lawyers. There's clearly a combined deal with the Covenant Not To Sue that goes along with it.

For the IBM deal, Mr. Wagner states in his report that there was a threat of infringement. And, again, we have a prima facie case here. Mr. Chen can't testify about it. Mr. Lee has submitted an affidavit, but he doesn't go into the details. And as -- as Your Honor know, the details are the thing. What do we cross examine him on? What do we say besides, "Well, there is no threat. Well, claim charts? What were the circumstances? Are they a related party? Does Carl Meyer own Google stock? How did Carl Meyer come to Google's attention?"

All these questions which they should have been prepared for, which he was prepared on the ones he had personal knowledge about, he did testify about. But

for the ones where evidently most important to Google, he just said nothing and now we're stuck trying to cross examine somebody who is relying on somebody else that contradicts the sworn testimony.

THE COURT: All right.

MR. NELSON: I'm sorry, Your Honor, one -- one brief point on Houlihan Lokey, the case they cite, it's clearly about the contention interrogatories and nothing else. Or excuse me, contention-type questions about what you pled and that was it. We have cited a whole swath of cases in our brief that you can't lay behind the log in discovery in -- in this very circumstance to say "I don't know" in discovery and prevent -- prevent us from taking discovery and then relying on it.

THE COURT: How do you reconcile the language of your notice, particularly the part where you're talking about acquisitions where you state the circumstances surrounding the acquisitions?

MR. NELSON: Well, Your Honor -- as Your Honor knows, there are very careful details about what we had to prove with respect to -- to acquisitions. And so what happened with respect to that and what we had to prove for -- for saying that the developed technology was -- was at issue in the acquisition. And -- and by

the way, if you look at this notice, Mr. Zoufonon testified, despite the very clear notice in Topic 30, well, what was the technology charge representing for developed technology, and he said, "I don't know." So I'm not sure even being more specific would have helped.

But regardless, with respect to -- to acquisitions, when we have to prove what's going out in developed technology and those were very specific to what the developed technology are is different from talking about license -- I will tell you, Your Honor, this is the standard forms that we've used in -- in almost every patent case about what license agreements are. We've never had someone say that -- that this is somehow unspecific and they have -- they didn't say that this was only going to go -- they were only going to put up a witness on the terms of the license agreements. They can't say that because the -- the notice is broader than that.

May I go back to Topic 25 and --

THE COURT: I've -- I've got it in front of me. I've read it.

MR. NELSON: Okay. Okay. Well, it's -- it's the evaluation --

THE COURT: I'm not saying that I agree with that distinction.

MR. NELSON: No, I understand.

THE COURT: I mean, I -- it's -- 30(b)(6) is not a shell game, okay? It's -- I mean, it's -- it imposes a duty to educate, not a duty not to educate. That's my view of Rule 30(b)(6), so I'm -- you know, I'm -- I just -- there is a distinction between the language of the two topics, and I want to, you know, drill down to why it exists.

MR. NELSON: Yes, Your Honor. The difference is just what we have to prove for acquisitions.

THE COURT: Okay. All right. I'll get you a written ruling on that, as well as I carried one with respect to Mr. Bratic.

What else is on my plate for today?

MR. TRIBBLE: We have the -- there's the inequitable conduct summary judgment motion. There's --

THE COURT: I'll get you a written ruling on that, too.

MR. TRIBBLE: There's MIL 17.

MR. GRINSTEIN: Yes, Your Honor, the outstanding motion in limine on prior art not charted.

THE COURT: Okay. I'll get -- that's under submission. I understand.

MR. TRIBBLE: There is a spoliation motion

that we filed yesterday about --

THE COURT: I'll hear argument on that before opening statement.

MR. TRIBBLE: And I was going to alert the Court to it. And --

THE COURT: I'm -- I'll hear argument on it. We're not going to go into any accusation of spoliation in opening statement.

MR. TRIBBLE: Of course not, Your Honor.

THE COURT: So if I have to push it off for some reason, don't view that as a license to -- to get into that.

MR. TRIBBLE: I'm not going to go there.

THE COURT: Okay.

MR. TRIBBLE: And we have a list for the Court. We've worked to narrow our exhibit list, and so we're withdrawing about 250 exhibits -- 350 exhibits. May I hand this up to the Court?

THE COURT: Yes.

MR. TRIBBLE: And we will submit an amended exhibit list.

THE COURT: Well, hold on a second. Before I -- has this been -- has this been shared with the other side?

MR. TRIBBLE: I gave it to them before the

start of the hearing.

THE COURT: Okay.

MR. VERHOEVEN: I just got it just now, Your Honor.

THE COURT: Well, you need to look -- look through it, and I'll hear any objections to the -- allowing them to withdraw at this stage. I mean, I -- ordinarily there's not a problem with it, but, you know, like I said, if you haven't put something in because it was on an exhibit list, then I -- I may have a problem. So -- but I'll -- I'll take that up before we start.

MR. VERHOEVEN: Understood, Your Honor.

May I have one moment? I think I may have one other thing.

THE COURT: Well, he's not through.

MR. VERHOEVEN: Okay.

THE COURT: Go ahead.

MR. TRIBBLE: And, Your Honor, just to remind the Court, our MILs 46 through 48 are being carried, and I believe Google's MIL 1 is being carried.

THE COURT: All right. I'll get you a written ruling on that.

MR. TRIBBLE: And that's all I have, other than to make the Court aware, you had said that you would try to be available during these depositions of

Ms. Wojcicki and Ms. Brin -- Mr. Brin. Ms. Wojcicki's deposition was last Thursday in California. Mr. Brin's deposition will be this coming Thursday in California at 3:00 to 5:00 p.m. Pacific time, so that would be 5:00 to 7:00 p.m. Texas time.

THE COURT: Y'all will have a court reporter there that can take down any hearing that I would have to have over the telephone, correct?

MR. TRIBBLE: We do, and there was no problem. I don't anticipate a problem, Your Honor.

THE COURT: Well, all I'm telling you is you can get my home phone number, my cell phone number from my clerk if you need me, okay?

MR. TRIBBLE: Thank you.

THE COURT: And I will -- I'll make myself available.

MR. TRIBBLE: Thank you.

THE COURT: I just won't have a court reporter traveling around with me just for -- for grins.

MR. TRIBBLE: I understand, Your Honor.

THE COURT: Yes, sir?

MR. VERHOEVEN: Your Honor, I just have one thing, and I'll keep it very brief, just hoping the Court can give us some guidance. It concerns the deposition designations. The parties have been

attempting -- Google has been attempting to negotiate and avoid bothering the Court with that.

Notwithstanding hours and hours and hours of attempts, Function Media still has 28 witnesses that they've listed as designations, over 20 hours of designated testimony, Your Honor, when they only have 15 hours total for the whole case. We believe that this is way too large and would encourage the Court to provide us with guidance on this.

Google itself does have about 10 hours of its own designations, but most of that, Your Honor, are prior artists who are third parties, and it's just insurance because if those parties don't show up, Your Honor, we'll have to play their testimony, but we fully intend to call them. And if you take out those witnesses, we have a total of around three hours. So it's become very problematic for us to try to not bother the Court about this, but we're still looking at over 20 hours of testimony from the plaintiffs.

MR. TRIBBLE: We're going to have to cut it down. I mean, and to be fair, I mean, they have like 15 will call witnesses. I mean, there's all kinds of paring down that's going to have to be done. We're working on making our cuts. We've been busy flying around taking depositions, but -- their expert got sick

and the schedule got pushed, and so this is -- and the scheduling of the Wojcicki and Brin depositions and so forth, and it's eaten up a lot of our manpower, and we're trying get these cut as quickly as we can, Your Honor.

THE COURT: Well, we're running short on time for me to -- if I have to get involved, so when can you get it cut to your final -- what you really intend to use?

We don't want you to flood them with it -- either side, for that matter, on Saturday, and then y'all come see me Tuesday morning at 8:00 and say, "Well, Judge, if you'd just rule on these three or 400 deposition objections, we can get started."

MR. TRIBBLE: Your Honor, I have to consult my deposition expert here.

THE COURT: Okay.

MR. TRIBBLE: Your Honor, can Mr. Burns -- this is Warren Burns.

THE COURT: Mr. Burns.

MR. BURNS: Good afternoon, Your Honor. I've been directly involved with our colleagues in -- in working through some of these --

THE COURT: When can you have them narrowed?

MR. BURNS: When can we have them narrowed,

Your Honor? I just want Your Honor to know that -- the short answer is, Your Honor, I think by the end of this week, we'll have a fairly narrow list.

THE COURT: All right.

MR. BURNS: So let you -- to give you a little broader perspective, Your Honor, we've already cut probably 15 hours of testimony. We're in the process of cutting it down further. We've worked with the other side on all but around eight depositions, narrowing down the objections to two or three per -- per deposition, so the objections have been narrowed significantly. And we are going to cut the additional test -- testimony, as well.

THE COURT: Well, the end of this week is Saturday night, right?

MR. BURNS: I would say by Friday, Your Honor.

THE COURT: Well, that -- you know, that's -- still doesn't give me any -- any time at all to resolve deposition designations is my problem.

MR. BURNS: One of the things we had -- actually were intending to inquire today, Your Honor, is your practice in terms of resolving that -- the -- the deposition objections.

THE COURT: I want your limited deposition

objections in here, along with the transcripts of those portions that are still objected to, by close of business Thursday. That's 5:00 o'clock, okay?

MR. BURNS: Thank you, Your Honor.

THE COURT: Both sides, okay?

MR. VERHOEVEN: Thank you, Your Honor. That's all that Google has, Your Honor.

THE COURT: All right. I'll get you rulings on the matters I've got outstanding, and we'll be ready to roll out Tuesday morning.

Mr. Gillam, do you have a moment that I can see you about a different matter?

MR. GILLAM: Yes, Your Honor.

THE COURT: All right.

COURT SECURITY OFFICER: All rise.

(Hearing concluded.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

SHELLY HOLMES Date
Deputy Official Reporter
State of Texas No.: 7804
Expiration Date: 12/31/10