

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC
F/K/A POLARIS IP, LLC

v.

GOOGLE INC., et al.

NO. 2:07CV-371-TJW-CE

**GOOGLE'S EMERGENCY MOTION TO CONTINUE TRIAL DATE AND FOR
ADDITIONAL TIME FOR TRIAL**

Introduction

Defendant Google Inc. respectfully files this emergency motion to continue the trial in this matter, currently scheduled for August 2, 2010.¹ Recent events make the schedule unworkable and severely prejudicial to Google.

As detailed in Defendants' Motion for Discovery Sanctions (Dkt. 478), Plaintiff failed to identify a critical witness with important information and documents and failed to produce, and indeed has yet to produce, other highly relevant documents in Plaintiff's control. This failure has drastically hampered Google's ability to collect evidence concerning key, invalidating prior art and to prepare for trial. The Court stated during the July 28, 2010 pretrial hearing that it was willing to consider proposals from Defendants as to how best to alleviate this prejudice, including the continuance of the trial. (Kammerud Dec., Ex. A - Tr. 78:14-17, 79:7-10.) Google requests that the Court continue the trial. Granting this continuance would permit Google to conduct complete discovery related to late-uncovered materials and witnesses. The opportunity to seek additional information about their case through both yet-uncovered documents and previously unknown witnesses would hopefully alleviate at least some of the severe prejudice Google has suffered due to Plaintiff's discovery failures.

In addition, the precise parameters of the case remain uncertain. On July 30, the Court granted Google's motion for summary judgment of non-infringement as to SASS for literal infringement, but not doctrine of equivalents. The Court raised uncertainty as to whether this ruling disposed of Plaintiff's literal infringement claims as to Claims 30, 31, and 33. Google will separately be filing a brief paper demonstrating that it does, and that it in fact disposes of

¹ On August 1, 2010, Plaintiff failed an Unopposed Motion to Dismiss America Online, Inc. and AOL LLC with Prejudice. (Dkt. 576.) In the event that America Online, Inc. and AOL LLC are not dismissed from the case, they join this Motion.

Plaintiff's infringement claims for Claims 30, 31, and 33 entirely because Plaintiff has no doctrine of equivalents theory for these claims. Given the timing, however, the Court will be unable to make a ruling as to Claims 30, 31, and 33 until the first day of trial at the earliest. The uncertainty regarding the asserted claims is thus another reason for a continuance.

Finally, Google requests that the Court grant Defendants a minimum of 20 hours to present their cases in light of differences between literal infringement and infringement under the doctrine of equivalents. Plaintiff is seeking an extremely large damages award against Defendants – including more than \$128 million from Google alone. Defendants need adequate time to examine Plaintiff's witnesses and experts and to present their case against these demands. At present, the parties have indicated they will call five experts, nine fact witnesses, and eleven witnesses by deposition. This cannot be done with thirteen hours per side without severely truncating examination in a manner that forces Defendants to omit critical issues from their presentation to the jury.²

Because trial is scheduled to begin in two days, Google files this motion on an emergency basis.

Background

I. PLAINTIFF'S DISCOVERY FAILURES IN DISCLOSING DOCUMENTS AND INFORMATION.

On July 23, 2010, Defendants filed a Motion for Discovery Sanctions for Failure to Disclose Key Discovery Regarding EZ Reader, that details how Plaintiff, among other things,

² Google understands that Defendant Yahoo! is opposed to continuance. Google would not object to, in the alternative of a continuance, bifurcation of the trial against Google from that against Yahoo!. The recent summary judgment rulings rendered Google's case quite different from Yahoo!'s. It would be confusing to the jury and, thus, prejudicial to all Defendants if Yahoo! was to present a case denying literal infringement while Google was presenting a case refuting doctrine of equivalents theories. Bifurcation would also alleviate the need for additional time for Defendants' cases to be presented jointly.

failed to (i) produce affidavits in its possession signed by one of the inventors of the patent-in-suit that specifically discuss the implementation and public use of EZ Reader; (ii) produce emails from one of the inventors that directly contradict its position on the public use defense; and (iii) include in its Rule 26 disclosures a witness (Chuck Williams) who it attempted to hire as a consultant because he “may be the only person who would provide this information” about EZ Reader and other relevant issues. (Dkt. 478.) In addition, Plaintiff’s Rule 30(b)(6) designee testified that Plaintiff had no knowledge of EZ Reader – a position that Plaintiff contradicted in the parties’ summary judgment briefing. (*Id.*)

As a result of Plaintiff’s discovery failures, Google did not have time to seek all relevant documents or to acquire some of the highly relevant documents known to exist, including two declarations by inventor Anthony Angotti that Plaintiff still has not produced. Google also has not had the opportunity to contact several people with relevant knowledge about the EZ Reader and other prior art systems, who were revealed by Chuck Williams and his documents. Nor will Defendants have time to do so before trial.

II. THE COURT’S JULY 30, 2010 SUMMARY JUDGMENT RULING SHIFTED THE FOCUS OF PLAINTIFF’S CASE AGAINST GOOGLE.

On July 30, 2010, the Court issued orders on Defendants’ summary judgment motions that render Plaintiff’s case against Google significantly different than its case against Yahoo!. The Court dismissed all literal infringement claims against Google’s SASS system, while allowing all literal infringement claims to survive against Yahoo!. (Dkts. 566, 567.) The Court found that Google’s SASS does not literally infringe the “case base knowledge engine” limitation in claim 26, but the Court also held that Plaintiff may argue that Smart Ads meets the case base knowledge engine limitation under the doctrine of equivalents. (Dkt. 566, 5.) The

Court also carried certain issues in Google's motion. (*Id.*, 4-6.) Plaintiff moved for emergency reconsideration of the Court's order that same evening. (Dkt. 572.)

Argument

I. IN LIGHT OF NEWLY DISCOVERED EVIDENCE NOT PRODUCED BY PLAINTIFF, THE COURT SHOULD CONTINUE THE TRIAL.

Google is materially prejudiced by the August 2 trial date because of their inability to complete discovery regarding late-produced (and certain unproduced) documents and recently discovered witnesses. In order to alleviate some of the resultant prejudice, Google asks the Court to grant a continuance. "The decision to grant or deny a continuance lies within the sound discretion of the district court." *Rhodes v. Amarillo Hospital District*, 654 F.2d 1148, 1153 (5th Cir. 1981). However, a showing of material prejudice from a denial of a continuance weighs in favor of granting the request. *Phillips v. Ferguson*, 182 F.3d 769, 774 (10th Cir. 1999) (considering prejudice in determining whether a continuance should have been granted); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (same).

Google already has been prejudiced by Plaintiff's discovery violations, and it faces additional prejudice from the August 2 trial date. Due to Plaintiff's failure to produce key documents or identify Chuck Williams, the former CEO of Brightware (the original assignee of the patent-in-suit), in its Initial Disclosures, Google has been denied the opportunity to conduct full discovery on such critical issues as the deployment of the EZ Reader and the specifications of other key prior art systems, such as the CBR Express.

If the trial is continued, then Google will have the opportunity to secure the documents it knows exist and to seek out additional documents likely to exist. In particular, Google can continue working with Plaintiff to get the still-unproduced declarations from named inventor

Anthony Angotti and, if necessary, depose him about both their existence and their contents. This includes determining whether there are more documents in the possession of Latham and Watkins, like the Angotti declaration, that have yet to be produced. Indeed, to date, Plaintiff has never confirmed it has obtained – or even searched for – all documents from Latham and Watkins regarding the ‘947 patent and EZ Reader.³

Further, defendants served a subpoena on Mr. Angotti for the production of documents that related to the ‘947 patent or its implementation in the EZ Reader System.” (Kammerud Dec., Ex. B - Angotti Sub.) On multiple occasions, Plaintiff’s counsel stated that Mr. Angotti had “no documents in his possession, custody or control that are responsive,” and counsel did not even produce a copy of Mr. Angotti’s consulting agreement. (*See, e.g.*, Kammerud Dec., Ex. C) Yet, at his November 13, 2009 deposition, Mr. Angotti testified that he had searched for and found about a “pizza crust box” sized amount of documents, including his consulting agreement and other communications with Plaintiff’s counsel, dating back to 2003. (Dkt. 478, Ex. I, 31-32 & 40-41.) Counsel for Plaintiff has never produced these documents either, or a privilege log. During subsequent meet and confers, Plaintiff committed to continue to investigate the status of documents that Mr. Angotti provided to Plaintiff’s counsel. Plaintiff’s counsel produced no more documents from Mr. Angotti until July 15, 2010 when Plaintiff produced to Defendants the 2004 Angotti affidavit with production numbers ANGOTTI000001-3, addressing EZ Reader.

Defendants requests that Plaintiff confirms it has produced all non-privileged documents from Mr. Angotti have been unsuccessful, as have Defendants’ requests for a privilege log for

³ Plaintiff seems to suggest that counsel for Google should have acquired documents from Sean Pak, a partner at Quinn Emanuel Urquhart & Sullivan who previously worked at Latham & Watkins. (Dkt. 537, 4). As Plaintiff acknowledges in a footnote, however, Defendants and their attorneys may not contact – and have not contacted – Mr. Pak regarding this case pursuant to screening procedures. (*Id.*, 4 n.2.)

him. Instead, Plaintiff claims that Plaintiff is somehow prejudiced by Defendants request for confirmation that all documents from Mr. Angotti have been produced, which is entirely reasonable under the circumstances given the late production of the Angotti declaration. (Kammerud Dec., Ex. D (“Can you please explain why Defendants waited until the eve of trial to make this request? Given the timing, it seems like it is only meant to prejudice Bright Response in its trial preparation efforts.”.) It is Defendants who have suffered the prejudice stemming from Plaintiff’s continued refusal to confirm that it has produced all non-privileged documents from Mr. Angotti or to provide a privilege log. The continuance of the August 2 trial would allow Google the opportunity to seek out still missing documents and learn what has been withheld due to privilege.

If the Court grants a continuance, Google also can seek emails that inventor Amy Rice has not yet produced. After Defendants located and contacted Chuck Williams, he produced thousands of documents and emails in response to Plaintiff’s document subpoena. Mr. Williams’ documents revealed additional emails that were never produced by Plaintiff or Ms. Rice, Plaintiff’s counsel’s client and consultant. Specifically, several emails received or transmitted from the same email account during the same time period as other emails Plaintiff chose to produce were not produced. Plaintiff produced only a fraction of the emails Ms. Rice sent and received regarding EZ Reader during the relevant time period. (*See* Dkt. 478, 3-5, 11.)

Google would like an opportunity to attempt to image Ms. Rice’s computer and other available means to obtain a complete document production. As a named inventor and a key witness for Plaintiff, Ms. Rice’s past communications are not only relevant, but are key to Google’s case. Google also would like the opportunity to attempt to image Mr. Williams’ computer to recover any relevant documents that have been deleted and, thus, not produced by

Mr. Williams. Further, although Plaintiff's counsel committed to provide us over a year ago, Plaintiff has still failed to produce a privilege log for documents produced by Ms. Rice just as it has failed to produce a privilege log for the Angotti documents. (*See* Kammerud Dec., Ex. D.) Without a continuance, Google simply cannot conduct these investigations.

Communications with Mr. Williams and review of the documents he produced has also revealed a number of individuals who are likely to possess knowledge relevant to this case. In fact, Mr. Williams repeatedly has contacted Defendants' counsel suggesting people with whom counsel should speak about the EZ Reader and other relevant prior art. Because Defendants have been focused on completing expert discovery, conducting dispositive and pre-trial motion practice, and preparing for trial, though, they have been unable to follow up on the leads provided by Mr. Williams. If the Court grants a continuance, then Google will be able to seek this additional, relevant discovery. Indeed, in light of the many recent discoveries and developments in the case, Google would be prejudiced if it did not have the opportunity to seek full testimony from Plaintiff itself on the EZ Reader through a Rule 30(b)(6) deposition and to follow up with the named inventors of the patent-in-suit regarding the many recently revealed pieces of evidence.

Google seeks the opportunity to complete discovery regarding late-produced (and other yet unrecovered) documents and recently discovered witnesses. Granting Google time to fully investigate documents and people known to hold relevant information would alleviate some of the prejudice it suffered due to Plaintiff's discovery failures.

II. THE COURT SHOULD GRANT DEFENDANTS AT LEAST 20 HOURS PRESENT THEIR CASES.

During the pre-trial conference, Plaintiff requested a mere 13 hours per side to present the case. (Kammerud Dec., Ex. A - Tr. 4:19-20.) Defendants requested 20 hours per side. (*Id.*,

4:22-23.) At that time, Defendants did not yet know they would be presenting very different cases to the jury, so they were acting on the assumption that their cases would have significant overlap. The Court granted Plaintiff 13 hours to present its case and all Defendants 13 hours to present their varied cases. (Dkt. 568.)

Defendants intend to call fourteen live witness between them – six specific to Google’s case, five specific to Yahoo!’s case, and three who will testify on behalf of all Defendants. Defendants also have identified 11 witnesses of whom they intend to play deposition videos, including the four named inventors. (Kammerud Dec., Ex. E.) Defendants simply cannot present comprehensive cases, including the cross examination of each of Plaintiff’s witnesses, within this limited amount of timeframe.

Further, now that Google must defend a case as to SASS focused on the doctrine of equivalents, while Yahoo! will focus on literal infringement, Defendants have less correspondence in the focus of their evidence and argument.

Accordingly, and in light of the fact that Plaintiff seeks damages of over \$128 million from Google alone, Google asks the Court to grant Defendants additional time to present their cases.

Conclusion

Google respectfully requests that trial in this case be continued to alleviate some of the prejudice suffered by Defendants due to Plaintiff’s failure to disclose relevant discovery. Further, Google requests that the Court grant Defendants at least 20 hours to present their cases.

DATED: August 1, 2010

Respectfully submitted,

By */s/ David Perlson*

Charles K. Verhoeven, CA Bar No. 170151
LEAD ATTORNEY

David A. Perlson, CA Bar No. 209502

Jennifer A. Kash, CA Bar No. 203679

Rachel H. Smith, CA Bar No. 222075

Eugene Novikov, CA Bar No. 257849

Quinn Emanuel Urquhart & Sullivan, LLP

50 California Street, 22nd Floor

San Francisco, CA 94111

Telephone: (415) 875-6600

Facsimile: (415) 875-6700

charlesverhoeven@quinnemanuel.com

davidperlson@quinnemanuel.com

jenniferkash@quinnemanuel.com

rachelsmith@quinnemanuel.com

Jennifer Parker Ainsworth

TX Bar No. 00784720

Wilson, Robertson & Cornelius, P.C.

P.O. Box 7339

Tyler, Texas 75711

Telephone: (903) 509-5000

Facsimile: (903) 509-5092

jainsworth@wilsonlawfirm.com

ATTORNEYS FOR DEFENDANT

Google Inc.

CERTIFICATE OF CONFERENCE

I hereby certify that a meet-and-confer took place on August 1, 2010 between at least Andrew Spangler and Jennifer Ainsworth. Plaintiff opposes Google and AOL's motion.

/s/ Margaret P. Kammerud
Margaret P. Kammerud

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Margaret P. Kammerud
Margaret Kammerud