

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

PA ADVISORS, LLC,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:07-cv-480-RRR
	§	
GOOGLE INC., et al.,	§	
	§	
Defendants.	§	
	§	

**NOTICE OF APPEAL OF NXN TECH, LLC
(FORMERLY KNOWN AS PA ADVISORS, LLC)
TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Notice is hereby given that Plaintiff nXn Tech, LLC (“nXn,” formerly known as PA Advisors, LLC), in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from all adverse orders and judgments of the District Court entered in the above numbered and styled action, including all orders and rulings encompassed within the District Court’s Amended Final Judgment of March 16, 2010 (Dkt. No. 486), the Court’s Order denying nXn’s Rule 59 Motion challenging that Judgment by order dated April 23, 2010 (Dkt. No. 510), and the Court’s May 19, 2010 Order (Dkt. No. 529) regarding costs.

This Notice of Appeal is timely filed, within 30 days after the District Court’s order denying Plaintiff’s Rule 59 Motion,¹ but the possibility exists that additional motions or rulings may be forthcoming given the nature of the Court’s recent disposition (Dkt. No. 529) of motions concerning Defendants’ motions to tax costs and declare the case exceptional under 35 U.S.C. § 285 and award attorneys’ fees. *See* Dkt. No. 492 (*Yahoo! Inc.’s Motion to Declare this an*

¹ The Court denied the Rule 59 motion on April 23, 2010, and the Notice of Appeal deadline is therefore Monday May 24, 2010. FED. R. APP. P. 4(a)(1)(A); FED. R. APP. P. 4(a)(4)(A)(iv)-(v); FED. R. CIV. P. 6(a)(1)(C) (when deadline files on Saturday, Sunday, or legal holiday, last day to file is extended to the next day that is not a Saturday or Sunday or legal holiday).

Exceptional Case and for Attorney' Fees and Costs pursuant to 35 U.S.C. Sec. 285); Dkt. No. 493 (*Google Inc.'s Motion for Determination of Exceptional Case and Award of Attorneys' Fees*); Dkt. No. 494 (*Proposed Bill of Costs* (filed by Yahoo! Inc.); Dkt. No. 495 (*Google Inc.'s Motion for Taxation of Costs*); Dkt. No. 512 (*Plaintiff's Response to Google's Motion for Determination of Exceptional Case and Award of Attorneys' Fees*); Dkt. No. 513 (*Plaintiff's Response to Google's Motion for Taxation of Costs*); Dkt. No. 514 (*Plaintiff's Response to Yahoo's Proposed Bill of Costs*²); Dkt. No. 515 (*Plaintiff's Response to Yahoo! Inc.'s Motion to Declare this an Exceptional Case and for Attorneys' Fees*).

If any further filings are made concerning the May 19, 2010 order (Dkt. No. 529), Plaintiff requests preemptively that the Court deactivate the Plaintiff's Notice of Appeal and reactivate the Notice of Appeal once the District Court rules on any future motions. *See Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1342 (Fed. Cir. 2007) (reactivating notice of appeal after having deactivated it subject to district court's ruling on all pending attorneys' fees motion; setting briefing deadlines after notice of appeal reactivated once district court rules).

Without limiting the orders or rulings encompassed within the Amended Judgment from which nXn takes this appeal, and without limiting the scope of arguments arising from all of those orders or rulings encompassed within the Amended Judgment, and any further rulings of the Court concerning the May 19, 2010 Order (Dkt. No. 529), nXn identifies the following orders, rulings, and judgments from which it takes this appeal:

1. Amended Final Judgment of March 16, 2010, Dkt. No. 486.

² The document identified at Docket Entry 514 was eventually renamed to reflect its actual title, Plaintiff's Objection to Yahoo's Bill of Costs, as reflected as Docket Entry Number 517 in light of difficulties on April 30, 2010 in linking the Plaintiff's Response to the appropriate filing to which it was responding.

2. Order of April 23, 2010, Dkt. No. 510, denying nXn's Rule 59 Motion for New Trial and/or Motion to Alter or Amend the Judgment, and, in particular, the additional substantive ruling made in that order: "although the court has stricken nXn's infringement theory based on the doctrine of equivalence, summary judgment of noninfringement would still be appropriate even it were considered because no reasonable jury could find that the accused systems operate in substantially the same way as the claimed invention or that the changes in the accused systems are insubstantial." Dkt. No. 510 (citing *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1296-97 (Fed. Cir. 2009)).

3. Order granting summary judgment of non-infringement, for the reasons stated therein, dated March 11, 2010, Dkt. No. 483.³

4. Order granting in part Defendants' requests for taxation of certain costs, dated May 19, 2010, Dkt. No. 529.

5. All rulings made in the course of the January 29, 2010 hearing⁴ on Yahoo! Inc.'s Motion to Strike New Infringement Opinions and Theories in Dr. Rhyne's January 22 Supplemental Expert Report, Dkt. No. 371, by which the District Court granted Yahoo's Motion to Strike as to certain portions of Plaintiff's Supplemental Expert Report of Dr. V. Thomas Rhyne, including portions of the report concerning Plaintiff's doctrine of equivalents theory. By challenging the District Court's granting in part Yahoo's Motion to Strike, nXn also challenges and complains of all rulings implied within the Court's express rulings on the record granting in part the Motion to Strike:

³ The Order granting summary judgment of non-infringement granted Dkt. Nos. 355, 356, 386 & 390.

⁴ See Dkt. No. 365 (setting January 29, 2010 video conference hearing on Defendants' Motions to Strike).

- a. the District Court's striking portions of nXn's supplemental expert report because the source code was produced in late December 2009, even though paper copies of the source code—pursuant to the Protective Order protocol—were not produced until after the expert report deadline.
 - b. the District Court's striking portions of nXn's supplemental expert report based on later-produced source code despite nXn's expert's inability to review a complete source code production earlier in the case—as set forth in nXn's December 21, 2009 Emergency Motion to Compel (Dkt. No. 339).
 - c. the District Court's ruling that to allow expert opinion on a doctrine of equivalents theory in nXn's supplemental expert report would constitute an untimely amendment of nXn's infringement contentions.
6. Orders made in the course of the January 29, 2010 hearing on Google Inc.'s Motion to Strike New Infringement Opinions and Theories in January 22 Supplemental Expert Report, Dkt. No. 372, by which the District Court granted Google's Motion to Strike as to certain portions of Plaintiff's Supplemental Expert Report of Dr. V. Thomas Rhyne, including those portions of the report concerning Plaintiff's doctrine of equivalents theory and references to the Google keyword suggestion tool. By challenging the District Court's granting in part Google's Motion to Strike, nXn also challenges and complains of all rulings implied within the Court's express rulings on the record granting in part the Motion to Strike, including but not limited to:
- a. the District Court's striking portions of nXn's supplemental expert report because the source code was produced in late December 2009, even though paper copies of the source code—pursuant to the Protective Order protocol—were not produced until after the expert report deadline.

- b. the District Court's striking portions of nXn's supplemental expert report based on later-produced source code despite nXn's expert's inability to review a complete source code production earlier in the case—as set forth in nXn's December 21, 2009 Emergency Motion to Compel (Dkt. No. 336).
- c. The District Court's ruling that to allow expert opinion on a doctrine of equivalents theory in nXn's expert report would constitute an untimely amendment of nXn's infringement contentions.

7. Any other adverse order, ruling, or judgment entered after the filing of this Notice of Appeal that may be subject to an amended or supplemental notice of appeal insofar as not encompassed within this Notice of Appeal, which amendment or supplemental nXn reserves the right to file if necessary.

Dated: May 20, 2010,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on May 20, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission, and/or first class mail on this same date.

Dated: May 20, 2010

/s/ Elizabeth A. Wiley
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