1	IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS			
2	MARSHALL DIVISION			
3	FPX, LLC	§ §	Civil Docket No. 2:09-CV-142-TJW	
4	v.	s S	2.05 07 112 10.1	
5		§ §	Marshall, Texas October 26, 2009	
6	GOOGLE, INC., ET AL	§	1:30 p.m.	
7	*****			
8	JOHN BECK AMAZING PROFITS, LLC	S	Civil Docket No. 2:09-CV-151-TJW-CE	
9	v.	§ §		
10		§ §	Marshall, Texas October 26, 2009	
11	GOOGLE, INC., ET AL	§	1:30 p.m.	
12	TRANSCRIPT OF SCH	IEDU	LING CONFERENCE	
10	BEFORE THE HONORA	BLE	CHAD EVERINGHAM	
13	UNITED STATES 1	MAG	ISTRATE JUDGE	
14	10000000			
15	APPEARANCES:			
16	FOR THE PLAINTIFF:		MR. DAVID MICHAEL PRIDHAM Attorney at Law	
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18	APPEARANCES CONTINUED ON NEXT I	PAGE	1	
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22	COURT REPORTER/: TRANSCRIBER		MS. SUSAN SIMMONS, CSR Official Court Reporter	
23			100 East Houston, Suite 125 Marshall, Texas 75670	
24			903/935-3868	
25	(Proceedings recorded by digitation produced on CAT system.)	al r	ecording, transcript	

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1	<u>PROCEEDINGS</u>			
2	THE COURT: Please be seated.			
3	A scheduling conference is set today in Cases			
4	2:09-CV-142 and 2:09-CV-151, FPX versus Google and Beck versus			
5	Google, respectively.			
6	What says the Plaintiff?			
7	MR. GLASSCOCK: Your Honor, we're ready. And			
8	if I can introduce my co-counsel is David Pridham and Marc			
9	Fenster, Your Honor.			
LO	MR. FENSTER: Good afternoon, Your Honor.			
L1	THE COURT: All right. Good afternoon.			
L2	I only mentioned Google, but there are other			
L3	Defendants involved in the cases as well. Who's here for the			
L 4	Defendants?			
L5	MR. BABCOCK: Your Honor, Charles Babcock and			
L 6	Carl Butzer of Jackson Walker for all Defendants.			
L7	THE COURT: All right. Y'all ready to proceed?			
L8	MR. BABCOCK: We are, Your Honor.			
L9	THE COURT: All right. Have a seat.			
20	Somebody tell me why I shouldn't consolidate			
21	these cases for discovery purposes and class dealing with			
22	the issues of certification.			
23	MR. FENSTER: May it please the Court, Your			
24	Honor, Marc Fenster. If I can, I'd like to address that.			
25	THE COURT: Uh-huh.			

MR. FENSTER: The -- the cases should be 1 2 consolidated or coordinated for discovery purposes, but not 3 consolidated. These are two separate classes involving different claims, and so while coordination for consoli -- for discovery purposes makes sense because there are overlapping 5 issues, I don't think that consolidation makes sense because there will be different questions for cert -- for 7 certification with respect to each class. The putative class 8 9 -- the putative classes are different, and putative class claims in each case are different. One is not just a mere 10 11 subset of the other.

THE COURT: Well, how are the class claims different?

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MR. FENSTER: The class claims in the state case, Your Honor, which is FPX, involve two state claims that are not included in the federal case which is now styled the Rodney Hamilton Living Trust. The -- the two fed -- the two state claims are, one, common law trademark infringement; and, two, unjust enrichment. And those claims are not at issue, nor is there any analog to them in the federal cases -- in the national class.

THE COURT: Okay.

MR. FENSTER: So there are considerable issues overlapping for discovery purposes, but ultimately there will be different questions for -- for certification, so we --

- 1 Plaintiffs' position is that we would like consolid -2 coordination but not consolidation.
- THE COURT: Okay.

- 4 MR. BABCOCK: Would you like to hear from our 5 perspective, Your Honor?
 - THE COURT: Well, it was your motion. I didn't mean to ask for the response first, but I didn't -- I think you just filed your motion a few days ago.
 - MR. BABCOCK: Yes. Yes, we did, and -- and it speaks for itself. The only thing I would add is he forgot that there are four additional Defendants in the FPX case, but the claims -- it's true there are two state claims, but they're identical allegations, identical things they have to prove, and the FPX class is a subset of the Beck class. In other words, they asked for state -- statewide Texas class certification and nationwide class certification in the Beck case, so the distinctions are in our view without a difference and they are trying to get substantial additional discovery based on those slim -- slim differences.
 - MR. FENSTER: Your Honor, I don't think that the Plaintiffs are looking for any additional discovery. We want to make sure that we have sufficient discovery in both cases, but it has been our proposal to Defendants throughout that discovery taken in one case should be used in both and that there should not be duplication between the two cases.

THE COURT: Well, are you asking for a hundred
hours of depositions per side in each case?

MR. FENSTER: No. In the combined cases.

THE COURT: The combined cases.

MR. FENSTER: A hundred hours, total, Your

6 Honor.

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7 THE COURT: Okay. All right. All right.

8 Putting aside the issue of whether they ought to be formally

9 consolidated, I'm going to address the issues of what

10 discovery you -- you're entitled to, and I'm going to give --

11 | I'll give you a hundred hours per side in the two cases, and

12 I'll call them for now -- for present purposes coordinated

13 cases. Whether or not I issue an order that consolidates all

14 or part of them for purposes -- either for discovery or

15 | through certification, I'll leave that -- I'll allow you to

16 | file a written response to the motion and I'll allow the

17 | briefing to -- to -- to complete on that, but, you know, a

18 | hundred hours per side is sufficient in these -- for -- for

19 | both cases as far as I'm concerned. So that's going to be the

20 order of the Court on your depositions.

21 | I'll adopt your -- well, on your proposed

22 written discovery, are you seeking 35 requests for production,

23 | 35 requests for interrogatories, and 35 requests for

24 admissions in each case or in the coordinated cases?

MR. FENSTER: Your Honor, I think we're fine

- 1 having that as the limits for the coordinating cases.
- 2 THE COURT: That will be the order of the Court
- 3 then for the coordinated cases.
- 4 Working back from certification, in light of
- 5 the discovery that I'm going to allow in the case, I'm going
- 6 to set you a certification date toward the end of October
- 7 2010.
- 8 Ms. Lockhart, you --
- 9 COURTROOM DEPUTY: Yes, sir.
- 10 THE COURT: -- I'm going to -- I'm going to set
- 11 | them both on the same day, one in the morning and one in the
- 12 afternoon. If I wind up consolidating them and hearing the
- 13 entirety of the argument that morning, then that may be what
- 14 | we do.
- 15 Ms. Lockhart, if you can give me a date the
- 16 last week of October 2010.
- 17 | COURTROOM DEPUTY: Which week of October?
- THE COURT: The last week?
- 19 | COURTROOM DEPUTY: How about Tuesday, October
- 20 | 26th, at 9:30 for one --
- 21 THE COURT: Tuesday, October 26th at 9:30 for
- 22 | the FPX, and then the Hamilton case will be set that same
- 23 afternoon at 1:30.
- 24 In light of that, y'all think y'all can meet
- 25 and confer on an agreed order with respect to the other

1 deadlines?

2 MR. FENSTER: I believe we can, Your Honor.

THE COURT: Well, the one -- one thing I want to ask you about is why are you requesting two different

5 deadlines for the identification of experts and then the

6 service of reports?

MR. FENSTER: Your Honor, they can -- they can be the same date. What I was concerned about was getting squeezed on the date for the reports because we need time to conduct surveys --

THE COURT: That's --

MR. FENSTER: -- so they can be at a later date and consolidated.

THE COURT: I under -- okay. Now, Mr. Babcock, if -- I mean, are y'all interested in receiving the identities of their expert and then -- one date and then the service of their reports on a second date or are you interested -- I mean, your proposal to me has it all happening on the same day, which is -- be customary in my Court, but I don't have frankly a preference. It's y'all's lawsuits, not mine, so...

MR. BABCOCK: We don't have a preference either, either way is fine with us.

THE COURT: Okay. Well, I'm going to tell you what I'm going to do. I'm going to go ahead, in light of the discovery that I've -- that I've allowed, I'm going to adopt

generally the Plaintiffs' proposal as to when the expert
reports are going to be due. Now, I'll phase them and let you
identify the experts at some earlier date if you want to, but
-- but the Defendants are telling me that they don't really
care one way or the other, so it -- I mean, it would be
customary for me to just have a single deadline in there for
the disclosure of experts and the --

MR. FENSTER: That makes sense.

THE COURT: -- service of reports, so absent agreement otherwise, I'd -- that'll be the order that -- that I sign.

Unless and until the certification order is issued in the case, I would be inclined to allow you to conduct discovery under the rules and not adopt a discovery order that, you know, provides for what — what I would call mandatory disclosures and what — I'd ordinarily use in a two-party, you know, case or maybe a two or three-party case that did not involve class action allegations. I'd wait to adopt a more formal discovery order once certification — those issues have been decided and I've — the Court's determined whether or not it's going to proceed as an individual claim or it's a class claim.

The general rule that I follow is that discovery is limited to issues of certification so when you're dealing with relevancy fights, you can bear that in mind. But

- I also have some understanding of what the -- the circuits
 2 look for in assessing certification issues, and there is going
- So, Mr. Babcock, from y'all's standpoint, you know, I think the law is going to require me to look at the merits of claims and defenses as they're asserted, so blanket objections to the relevancy of the production of information on the grounds that it goes to the merits of of the claims and are not limited to class certification issues
- MR. BABCOCK: Yes, Your Honor.

are going to be ill-received. Okay?

to be some overlap in the merits.

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- THE COURT: With that, what else do y'all want
 me to do today insofar as resolving your differences in this
 case?
 - MR. FENSTER: I think that takes care of it from the Plaintiffs' perspective.

disputes as to discovery limitations. I've tried to give you some guidance on — on the schedule that I'd like to see you adopt, and I'm essentially adopting the Plaintiffs' version of — of when things need to happen and I don't — y'all know your schedules more than I do, so when you give me a May of 2010 date, I — I'll allow you a week to meet and confer and see if you can pick the right date in May for, for instance, the — the Defendants — you know, the rebuttal reports, for

- 1 instance. Then sometime in April of 2010 for your opening 2 expert reports.
- And motion for class certification will be due sometime in July of 2010.
- 5 MR. BABCOCK: Your Honor --
- 6 THE COURT: Yes, sir.

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- MR. BABCOCK: -- I just had two brief things.

 One, there was language that we had found in the Court's order in the class case involving the Goldman-Sachs and Broadhead case, and I think it was Paragraph 15 that -- that gave everybody some guidance as to the -- what you just told us about the overlap between merits and we would -- we would ask that that language be incorporated in whatever order you have just so that we have some guidance and can talk to our
- THE COURT: Well, if you can -- I mean, I don't know that what I said tracks precisely what was said by the Court in the Goldman-Sachs case --
- MR. BABCOCK: Pretty close.

clients, et cetera, et cetera.

THE COURT: -- but that would certainly be one that I look to if I were called up to craft an order. And if y'all want to supply a copy to counsel and include it in the final order that governs your -- the case through the disposition of class certification, then I'll include it in there.

MR. BABCOCK: That would be great, Your Honor.

Yeah, we have supplied it to them and it's also in our

3 proposal, so...

4 THE COURT: Okay.

MR. BABCOCK: One other matter, and I think maybe I won't speak for Plaintiffs' counsel, but we were a little puzzled about a provision that the Court asked about which is Item 6 in our joint proposal which was deadline for filing any dispositive motions of class certification issues which was a different request for a date than the — than the class certification hearing.

And as I was looking at it last night, it -- it struck me that there may be a preliminary motion that the Defendants would want to make that perhaps was what the Court had in mind or maybe not, but this is a very unusual case in that as far as we can tell, there's never been a class certified in a trademark dispute like this one.

And there was an identical case that was just decided in Illinois, a case called Vulcan Golf versus — coincid — coincidentally Google. And in that case there was no discovery allowed. The Court said that just per se, based on the type of claims that there were, class certification was inappropriate.

I wondered if it would be -- if it would fit in with the Court's schedule, which we're fine about, but to have

- some date -- earlier date -- we had said April, but I think 1 2 maybe earlier than that even -- when we could raise that type of an issue with the Court, just that this is a trademark 3 claim. By the very nature of trademarks, it defies class --4 5 you can't ascertain a class. It's sort of a per se matter. And if the Court would entertain that, great; and if not, 7 we'll just wait until you've made my law firm or they've made my law firm a lot of money and we've done a lot of 8 9 depositions.
 - THE COURT: Well, I don't -- I don't have a disinclination to putting that deadline in there. I don't have an aversion to doing it sooner rather than later. I want everybody to understand, though, that the filing of such a motion doesn't stay discovery.

MR. BABCOCK: Right, exactly.

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THE COURT: So I mean, I don't want you to -to resist doing discovery on the grounds that -- that you
think I'm going to recommend that motion be granted. Okay?

MR. BABCOCK: Absolutely, yeah.

THE COURT: As long as everybody is on the same page, if you've got something to file, you know, particularly something along those lines, I suggest doing it sooner rather than later if you want to get it before Court. Okay?

MR. BABCOCK: Very well, Your Honor. And if I could -- to the extent the Court's interested, I've got an

- 1 extra copy of this Vulcan -- Vulcan versus Google case. If I
 2 could leave it with your law clerk?
- 2 could leave it with your law clerk?

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- THE COURT: That would be fine. Supply a copy to counsel, as well.
- 5 MR. BABCOCK: Thank you, Your Honor. That's 6 all I had.
- THE COURT: Well, short of just adopting that

 view today and sending everyone on their way, is there

 anything else we can do today to resolve the case sooner

 rather than later?
 - MR. FENSTER: No, Your Honor. I just do want to comment very briefly on the Vulcan matter, Your Honor.
 - We are very familiar with the Vulcan case.

 This case is very different than the Vulcan case, and I think that the motion that Defendants are contemplating is actually a motion regarding certification that can only be decided during certification. I think that it will be a waste of the parties' resources and the Court's time in that it will ultimately be put off until certification, but we'll respond to the motion as as it's brought out.
 - THE COURT: If they file it, you need to respond to it or ask for such extensions as you think are appropriate in light of what the procedural history of the case is, but -- okay?
- MR. FENSTER: Will do, Your Honor.

you've asked for, and if he's got a request to make, I'm generally going to allow parties to make those requests. Okay? MR. FENSTER: Thank you, Your Honor. THE COURT: Anything else we can do today from the Plaintiffs' standpoint? MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * * (Hearing adjourned.) Hearing adjourned.) The court is a secure of the court of t	1	THE COURT: I've given you the discovery that	
MR. FENSTER: Thank you, Your Honor. THE COURT: Anything else we can do today from the Plaintiffs' standpoint? MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * * (Hearing adjourned.) 20 21 22 23	2	you've asked for, and if he's got a request to make, I'm	
MR. FENSTER: Thank you, Your Honor. THE COURT: Anything else we can do today from the Plaintiffs' standpoint? MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * (Hearing adjourned.) 10 11 12 13 14 15 16 17 18 19 20 21 22 23	3	generally going to allow parties to make those requests.	
THE COURT: Anything else we can do today from the Plaintiffs' standpoint? MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * * The court of the cou	4	Okay?	
The Plaintiffs' standpoint? MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * * (Hearing adjourned.) 18 19 20 21 22 23	5	MR. FENSTER: Thank you, Your Honor.	
MR. FENSTER: No, Your Honor. Thank you. THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * (Hearing adjourned.) 18 19 20 21 22 23	6	THE COURT: Anything else we can do today from	
THE COURT: Defendants'? MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * 17 18 19 20 21 22 23	7	the Plaintiffs' standpoint?	
MR. BABCOCK: No, Your Honor. THE COURT: All right. Y'all are excused. Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * 17 18 19 20 21 22 23	8	MR. FENSTER: No, Your Honor. Thank you.	
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Thank you for being here. MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * 17 18 19 20 21 22 23	10	MR. BABCOCK: No, Your Honor.	
MR. BABCOCK: Thank you, Your Honor. COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * 17 18 19 20 21 22 23	11	THE COURT: All right. Y'all are excused.	
COURT SECURITY OFFICER: All rise. (Hearing adjourned.) * * * * * * 17 18 19 20 21 22 23	12	Thank you for being here.	
(Hearing adjourned.) 16	13	MR. BABCOCK: Thank you, Your Honor.	
16 *	14	COURT SECURITY OFFICER: All rise.	
17 18 19 20 21 22 23	15	(Hearing adjourned.)	
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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a correct transcript from the digital recording of the proceedings in the above-entitled matter to the best of my ability.

DATE

SUSAN SIMMONS, CSR

Official Court Reporter State of Texas No.: 267

13 Expiration date: 12/31/10