

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

[!PLAINTIFF],) 13-MD-2430-LHK
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) OCTOBER 2, 2013
)
[!DEFENDANT],) PAGES 1-13
)
DEFENDANT.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: CORY WATSON CROWDER DEGARIS, PC
BY: JEROME TAPLEY
2131 MAGNOLIA AVENUE, STE 200
BIRMINGHAM, AL 35205

FOR THE DEFENDANT: COOLEY, LLP
BY: WHITTY SOMVICHIAN
MICHAEL RHODES
101 CALIFORNIA STREET, 5TH FL
SAN FRANCISCO, CA 94111

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED WITH COMPUTER.

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

1 FOR THE PLAINTIFF: CARTER WOLDEN CURTIS, LLP
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1 SAN JOSE, CALIFORNIA

OCTOBER 2, 2013

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS
4 WERE HELD:)

5 THE CLERK: CALLING FIRST CASE NUMBER 13-MD-2430-LHK.
6 IN RE GOOGLE GMAIL CORPORATION LITIGATION.

7 MR. SOMVICHIAN: GOOD AFTERNOON, YOUR HONOR.

8 WHITTY SOMVICHIAN AND MIKE RHODES WITH COOLEY FOR GOOGLE.

9 THE COURT: GOOD AFTERNOON.

10 MR. TAPLEY: GOOD AFTERNOON, YOUR HONOR. JEROME
11 TAPLEY, SEAN ROMMEL AND KIRK WOLDEN FOR PLAINTIFFS.

12 THE COURT: OKAY. GOOD AFTERNOON.

13 LET'S START OFF WITH THE JOINT CASE MANAGEMENT STATEMENT
14 THAT STATES THAT GOOGLE IS CONTINUING TO EVALUATE WHETHER
15 FURTHER MOTIONS MAY BE NECESSARY IN LIGHT OF THE COURT'S RULING
16 ON THE MOTION TO DISMISS.

17 CAN YOU LET ME KNOW WHAT MOTIONS YOU ARE CONTEMPLATING
18 AND WHETHER YOU MADE A DECISION OR NOT?

19 MR. SOMVICHIAN: YES. WE DO HAVE AN UPDATE ON THAT,
20 YOUR HONOR.

21 WE PLAN TO FILE A MOTION WITH THE COURT ASKING THAT THE
22 MOTION TO DISMISS BE CERTIFIED WITH INTERLOCUTORY APPEAL UNDER
23 SECTION 1292.

24 THE COURT: ALL RIGHT.

25 MR. SOMVICHIAN: WE PLAN TO THAT AS SOON AS WE CAN.

1 WE STARTED TO CONFER WITH PLAINTIFFS ABOUT A BRIEFING SCHEDULE
2 FOR THAT. WE HAVEN'T RESOLVED THAT YET, BUT WE ARE IN THE
3 PROCESS --

4 THE COURT: I'M GOING TO GIVE YOU ONE.

5 MR. SOMVICHIAN: OKAY.

6 THE COURT: OKAY. ARE YOU ALSO ASKING FOR A STAY?
7 IS THE STAY MANDATORY? DISCRETIONARY?

8 MR. SOMVICHIAN: IT'S DISCRETIONARY, YOUR HONOR.

9 WE WOULD NOT BE ASKING FOR A STAY WHILE WE RESOLVE THE
10 MOTION TO YOUR HONOR.

11 NOW IF ULTIMATELY YOU AGREE TO CERTIFY THE MOTION FOR AN
12 INTERLOCUTORY APPEAL, WE WOULD THEN MOVE WITHIN TEN DAYS TO THE
13 NINTH CIRCUIT.

14 IF THE NINTH CIRCUIT THEN ACCEPTS THE CASE FOR
15 INTERLOCUTORY APPEAL, WE MAY REQUEST A STAY AT THAT POINT. BUT
16 UP UNTIL THEN IT'S NOT OUR INTENTION TO DEFER ANY OF THE DATES
17 WE ARE CURRENTLY PROPOSING IN THE CMC STATEMENT.

18 THE COURT: OKAY.

19 SO YOU ARE NOT GOING TO ASK FOR A STAY ALONG WITH THE 1292
20 MOTION. YOU ARE GOING TO WAIT UNTIL THE CIRCUIT RULES ON
21 WHETHER IT'S GOING TO ACCEPT IT, ASSUMING I GRANT THE 1292
22 MOTION, THEN YOU MOVE FOR A STAY.

23 MR. SOMVICHIAN: THAT'S RIGHT, YOUR HONOR.

24 THE COURT: THEN YOU WOULD MOVE FOR A STAY.

25 WHY DON'T YOU WANT TO DO IT AT THE SAME TIME, THE 1292?

1 MR. SOMVICHIAN: YOUR HONOR, IN THE EVENT YOU
2 DISAGREE OR THE NINTH CIRCUIT DOESN'T WANT TO TAKE THE CASE UP
3 ON APPEAL, OUR THOUGHT INITIALLY WAS TO KEEP THE CASE
4 PROCEEDING, IF YOU THINK THAT IT'S BETTER TO PUT THINGS ON
5 HOLD. WE ARE CERTAINLY AMENABLE TO THAT AS WELL, BUT OUR
6 INCLINATION BASED ON PRIOR CMC'S WITH YOUR HONOR WOULD BE TO
7 KEEP THE CASE PROCEEDING UNTIL WE KNOW WHETHER THE
8 NINTH CIRCUIT WANTS TO TAKE IT OR NOT.

9 THE COURT: YEAH. I'M NOT INCLINED TO GRANT A STAY.
10 SO THAT'S FINE IF YOU WANT TO DO ONLY A 1292 MOTION BY
11 ITSELF.

12 NOW YOU COULD ALSO SEEK A STAY FROM THE NINTH CIRCUIT IF
13 I DENIED THE STAY; IS THAT RIGHT?

14 MR. SOMVICHIAN: THAT'S RIGHT.

15 THE COURT: ALL RIGHT.

16 WELL THIS IS WHAT I WOULD LIKE TO DO. JUST FOR MY OWN
17 CALENDAR, BECAUSE NOVEMBER IS GOING TO BE PRETTY FULL WITH SOME
18 TRIALS, I WOULD LIKE TO HAVE YOU FILE YOUR MOTION BY
19 OCTOBER 9TH WHICH WOULD BE A WEEK FROM TODAY AND TO GIVE THE
20 PLAINTIFFS ONE WEEK UNTIL OCTOBER 16TH FOR AN OPPOSITION, THEN
21 I WOULD RATHER NOT HAVE A REPLY.

22 AND IF WE NEED A HEARING THAT COULD BE OCTOBER 24TH WHICH
23 IS THURSDAY. OTHERWISE I MIGHT JUST VACATE THAT DATE FOR A
24 HEARING. HOW DOES THAT SOUND?

25 MR. SOMVICHIAN: YOUR HONOR, COULD WE HAVE UNTIL THE

1 FOLLOWING WEEK IN ORDER TO FILE THE MOTION?

2 THE COURT: THIS IS THE PROBLEM, I HAVE A LONG
3 CRIMINAL TRIAL STARTING NOVEMBER 4TH AND I HAVE CLASS CERT AND
4 SUMMARY JUDGEMENT IPHONE MDL ON OCTOBER 31 AND NOVEMBER 7 AND I
5 HAVE THE APPLE V. SAMSUNG TRIAL NOVEMBER 12TH.

6 SO I'M GETTING SCRUNCHED. SO THAT'S WHY I'M TRYING TO
7 FIGURE OUT A TIME THAT WORKS FOR MY SCHEDULE. JUST BECAUSE IF
8 I BUMP YOUR DATE TO THE 7TH AND BUMP THEIR DATE TO THE 23RD
9 THEN I'M HITTING CLASS CERT AND SUMMARY JUDGEMENT IN THE MDL
10 AND I'M HITTING A CRIMINAL TRIAL, THEN I'M HITTING APPLE V.
11 SAMSUNG RETRIAL.

12 I'M SORRY, I JUST DON'T THINK I CAN ACCOMMODATE THAT
13 SCHEDULE.

14 MR. SOMVICHIAN: THAT'S FAIR, YOUR HONOR.

15 THE COURT: IS THAT ALL RIGHT? I'M SORRY.

16 MR. SOMVICHIAN: WE WILL MAKE IT HAPPEN.

17 THE COURT: OTHERWISE IT WOULD GET BUMPED OUT
18 PROBABLY INTO NEXT YEAR WHICH I WOULD RATHER NOT DO.

19 MR. TAPLEY: YOUR HONOR, WE CAN FROM THE PLAINTIFF'S
20 PERSPECTIVE OUR OPPOSITION BEING DUE THE 16TH IS DOABLE.

21 IF WE MOVED IT TO THE 24TH THAT'S ESSENTIALLY THE SAME DAY
22 THAT OUR CLASS CERT BRIEFING IS DUE AND WE WOULD RATHER NOT
23 HAVE THOSE AT THE SAME TIME.

24 SO THE NINTH AND THE 16TH IS DOABLE FOR US.

25 MR. SOMVICHIAN: YOUR HONOR, DOES IT MAKE A

1 DIFFERENCE BETWEEN THE NINTH, A WEEK FROM TODAY VERSUS THE END
2 OF NEXT WEEK? THE 11TH?

3 THE COURT: WELL IT WOULD THEN JUST CUT INTO MY TIME.

4 I ASSUME YOU NEED A FULL SEVEN DAYS, OR HOW MUCH TIME DO
5 YOU NEED FOR THE OPPOSITION? OR MAYBE YOU'RE NOT GOING TO
6 OPPOSE, I DON'T KNOW, ARE YOU GOING TO OPPOSE.

7 MR. TAPLEY: YOUR HONOR, WE FOUND OUT FIVE MINUTES
8 BEFORE THE HEARING THEY WILL FILE IT.

9 SO I DON'T KNOW WHAT WE WILL DO. MY GUESS IS WE WILL
10 OPPOSE, BUT HAVING NOT SEEN IT AND NOT HAVING AN OPPORTUNITY TO
11 CONSIDER IT I'M JUST GIVING YOU MY BEST GUESS AT THE MOMENT.

12 THE COURT: OKAY.

13 I WOULD LIKE TO HAVE MORE TIME WITH IT THAN LESS. I HAVE
14 THE APPLE V. SAMSUNG PRETRIAL CONFERENCE OCTOBER 10TH AND
15 OCTOBER 17TH.

16 SO IF YOU SQUEEZE ME ON THE BACK END I WILL HAVE LESS TIME
17 TO ACTUALLY CONSIDER THIS, AND IT'S VERY IMPORTANT, SO I WOULD
18 LIKE TO GIVE IT ENOUGH TIME IF THAT'S ALL RIGHT.

19 MR. SOMVICHIAN: IF YOU WOULD LIKE TO KEEP IT THE 9TH
20 AND YOU THINK THAT WILL GIVE YOU MORE TIME, THAT'S FINE,
21 YOUR HONOR.

22 THE COURT: OKAY. 9TH, 16TH, AND LET'S PLAN ON THE
23 24TH, MOST LIKELY A WON'T NEED A HEARING ON THIS.

24 MR. SOMVICHIAN: YOUR HONOR, WE HAVE ON OUR SIDE
25 CONFLICTS ON THE 24TH. COULD WE MOVE IT TO THE NEXT DAY?

1 THE COURT: THE 25TH I CANNOT.

2 WHAT DO WE HAVE ON -- WHAT DID WE MOVE TO THE 28TH?

3 (OFF-THE-RECORD DISCUSSION.)

4 THE COURT: OKAY. WHAT ABOUT THE 28TH? DOES THAT
5 WORK BETTER?

6 MR. SOMVICHIAN: UNFORTUNATELY, THAT'S ANOTHER
7 CONFLICT ON OUR SIDE.

8 THE COURT: WHAT ABOUT THE 29TH? THE TUESDAY.

9 MR. SOMVICHIAN: THAT WOULD WORK.

10 THE COURT: DOES THAT WORK FOR YOU ALL? OKAY.

11 MR. TAPLEY: THE 29TH IS FINE WITH PLAINTIFFS AS
12 WELL, YOUR HONOR.

13 THE COURT: I REALLY ACTUALLY DON'T THINK WE ARE
14 GOING TO NEED A HEARING. MY CONCERN IS THAT IT'S RUNNING INTO
15 THE 31ST.

16 I ALSO HAVE SUMMARY JUDGEMENT ON A PATENT CASE ON THE 31ST
17 AND SOME OTHER LAW AND MOTION.

18 WHAT IF WE DID THIS, WELL, I GUESS I NEED TO GET ON YOUR
19 SCHEDULES. WE COULD JUST SAY NO HEARING THEN I CAN CONTACT IF
20 WE DO NEED ONE.

21 OTHERWISE -- I GUESS WE CAN HAVE THE HEARING ON THE 29TH.
22 I MAY JUST VACATE IT AND DECIDE IT ON THE PAPERS ANY WAY. AND
23 IF WE KEEP THE BRIEFING SCHEDULE AS IS THEN I WILL TRY TO, YOU
24 KNOW, HOPEFULLY GET YOU AN ORDER PROMPTLY.

25 BUT WE CAN SAY OCTOBER 29TH WHICH IS TUESDAY. SHOULD WE

1 SAY 1:30?

2 MR. SOMVICHIAN: OKAY.

3 THE COURT: WE COULD SAY -- WHY DON'T WE SAY
4 10:00 A.M., THAT WAY IT WON'T CONFLICT WITH THE PREPARATION WE
5 NEED TO DO WITH EVERYTHING HAPPENING ON THE 31ST.

6 OKAY. SO THAT'S WHAT WE WILL DO ON THAT.

7 MR. SOMVICHIAN: NO, YOUR HONOR.

8 OUR PREFERENCE, OBVIOUSLY, WOULD BE TO DO A SHORT REPLY IN
9 CONNECTION WITH THE MOTION. IF IT'S YOUR PREFERENCE NOT TO
10 HAVE, WE WILL OF COURSE ABIDE BY THAT. BUT IF YOU WOULD
11 ENTERTAIN A BRIEF REPLY ON A SHORTENED SCHEDULE, WE COULD
12 CERTAINLY DO THAT.

13 THE COURT: NO, I THINK I'M FINE. THANK YOU.

14 I'VE ALREADY STARTED LOOKING AT THE LAW BECAUSE I SUSPECTED
15 YOU MIGHT BE CONSIDERING THIS.

16 OKAY. YOUR REQUEST TO EXTEND YOUR DEADLINE TO FILE THE
17 ANSWER TO OCTOBER 18TH THAT'S UNOPPOSED, CORRECT?

18 MR. TAPLEY: YES, YOUR HONOR.

19 THE COURT: THAT'S FINE. SO THAT'S GRANTED.

20 SO GOOGLE SHALL ANSWER -- I ASSUME SINCE THEY'RE NOT
21 AMEND YOU GO WON'T FILE ANOTHER MOTION TO DISMISS.

22 MR. SOMVICHIAN: THAT'S CORRECT.

23 THE COURT: OKAY.

24 I WOULD LIKE TO GO AHEAD AND SET THE REST OF THE CASE
25 SCHEDULE, THANK YOU FOR STIPULATING ON THE NEW PENNSYLVANIA

1 PLAINTIFF.

2 LET'S GO AHEAD AND SET A CASE SCHEDULE. OBVIOUSLY, THIS
3 COULD GET AFFECTED BY WHATEVER HAPPENS DOWN THE ROAD, BUT I
4 WOULD LIKE TO SET THE FURTHER CMC FOR JANUARY 16TH OF 2014
5 WHICH IS WHEN WE ARE SET TO HAVE THE CLASS CERT HEARING.

6 NOW EXPLAIN TO ME, MOST OF YOUR DATES WERE JUST
7 SEVEN-DAYS APART. WAS THAT BECAUSE OF COUNSEL'S AVAILABILITY?

8 MR. SOMVICHIAN: NO, THE DIFFERENCE, YOUR HONOR, IS
9 SIMPLY THE FACT THAT WE WANTED TO HAVE A DEFINED FACT DISCOVERY
10 CUTOFF BEFORE WE GET INTO THE EXPERT PROCESS SO THAT THE
11 EXPERTS AREN'T DEALING WITH A MOVING TARGET IN TERMS OF THE
12 RECORD.

13 THE PLAINTIFF'S PROPOSAL DOESN'T HAVE A SEPARATE FACT AND
14 EXPERT DISCOVERY CUTOFF AND THAT EXPLAINS THE DIFFERENCE.

15 THE COURT: I SEE.

16 MR. SOMVICHIAN: WE'VE ALSO ASKED FOR ONE ADDITIONAL
17 WEEK IN BETWEEN THE PRETRIAL CONFERENCE AND THE JURY TRIAL DATE
18 AS COMPARED TO THE INTERVAL THAT THE PLAINTIFFS ARE PROPOSING
19 JUST TO GIVE US A LITTLE BIT MORE TIME TO PROCESS THE RESULT OF
20 ANY DISPOSITIVE MOTION TO GET THINGS PREPARED.

21 THE COURT: OKAY.

22 MR. SOMVICHIAN: WELL, THIS IS WHAT I WOULD LIKE TO
23 SUGGEST. IT'S MOSTLY GOOGLE'S DATES.

24 YOU'RE VERY CLOSE ANY WAY, BUT TO HAVE A FACT DISCOVERY CUT
25 OFF OF APRIL 3RD, NOW THAT ASSUMES THERE'S GOING TO BE NO GAME

1 PLAYING ON THE DISCOVERY.

2 SO OBVIOUSLY I'M GOING TO ASSUME THAT THAT'S NOT GOING TO
3 HAPPEN IN THIS CASE OR HAPPEN ANY FURTHER. I DO THINK THERE
4 HAS BEEN SOME HIDE-THE-BALL ON DISCOVERY SO FAR.

5 SO APRIL 3RD, 2014. OPENING EXPERT REPORTS APRIL 17TH.
6 REBUTTAL EXPERT REPORTS MAY 1ST. CLOSE OF EXPERT DISCOVERY
7 MAY 15TH. FILE YOUR DISPOSITIVE MOTIONS ON MAY 29TH. AND THE
8 HEARING ON DISPOSITIVE MOTIONS WILL BE JULY 17TH AT 1:30.

9 FINAL PRETRIAL CONFERENCE SEPTEMBER 25TH AT 1:30 AND THE
10 OCTOBER 20TH TRIAL DATE THAT GOOGLE PROPOSES IS FINE. I WILL
11 SET IT FOR 9:00 A.M. AND I WILL TENTATIVELY SET IT FOR NINE
12 DAYS, OBVIOUSLY THAT CAN BE ADJUSTED AS THE CASE PROGRESSES.

13 DO YOU NEED ME TO REPEAT ANY OF THOSE DATES?

14 MR. TAPLEY: NO, YOUR HONOR.

15 MR. SOMVICHIAN: I THINK WE HAVE THEM, YOUR HONOR.

16 THE COURT: OKAY.

17 SO NOW REGARDING ALTERNATIVE DISPUTE RESOLUTION, IS IT
18 GOOGLE'S POSITION THAT YOU ACTUAL NEED AN ORDER ON THE CLASS
19 CERT MOTION BEFORE YOU ARE WILLING TO HAVE A DISPUTE RESOLUTION
20 SESSION, OR IS JUST THE BRIEFING SUFFICIENT, OR JUST THE
21 MOTION.

22 MR. SOMVICHIAN: WELL, AT THIS POINT, YOUR HONOR, I
23 THINK WE DO NEED GUIDANCE ON THE CLASS CERTIFICATION ISSUES IN
24 ORDER TO HAVE A PRODUCTIVE MEDIATION SESSION.

25 THE COURT: OKAY. ALL RIGHT.

1 THEN WHY DON'T WE GO AHEAD AND SET A MARCH 15TH DEADLINE
2 FOR ALTERNATIVE DISPUTE RESOLUTION.

3 MR. SOMVICHIAN: I THINK THAT WOULD BE FINE,
4 YOUR HONOR.

5 MR. TAPLEY: FINE, YOUR HONOR.

6 THE COURT: OKAY. AND WHAT FORM DO YOU WANT? WHAT
7 WOULD BE MOST HELPFUL AT THAT STAGE?

8 MR. SOMVICHIAN: I THINK WE CAN CONFER AND AGREE ON A
9 PRIVATE MEDIATOR.

10 THE COURT: OKAY.

11 MR. SOMVICHIAN: WE HAVE SPOKEN ABOUT THAT ALREADY.

12 THE COURT: YOU HAVEN'T HAD ANY SESSIONS SO FAR,
13 RIGHT?

14 MR. SOMVICHIAN: NO.

15 MR. TAPLEY: NO, YOUR HONOR.

16 THE COURT: ALL RIGHT.

17 WELL, I WILL SET A PRIVATE MEDIATION DEADLINE OF MARCH 15TH
18 OF 2013.

19 ALL RIGHT. WHAT ELSE, ANYTHING ELSE FOR TODAY?

20 MR. TAPLEY: NO, YOUR HONOR.

21 MR. SOMVICHIAN: I THINK THAT'S IT, YOUR HONOR.

22 THE COURT: NO. OKAY.

23 THANK YOU.

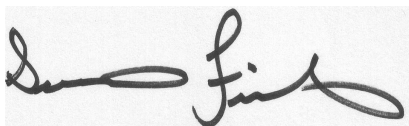
24 MR. SOMVICHIAN: THANK YOU.

25 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 10/11/13