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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF FLORIDA
4 MIAMI DIVISION
5 CASE NO. 1:20-cv-20970

4 PAYRANGE, INC., Miami, Florida
5 Plaintiff, July 27, 2021
6 vs. 9:37 a.m. to 1:19 p.m.
7 KIOSOFT TECHNOLOGIES, LLC, et al.,
8 Defendants. Pages 1 to 127
9

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11 RULE 11 HEARING
12 BEFORE THE HONORABLE LAUREN LOUIS
13 UNITED STATES MAGISTRATE JUDGE

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WITNESSES FOR THE DEFENDANT:

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Charles Li

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By Ms. Banta

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By Mr. Smith

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DEFENDANTS' EXHIBITS RECEIVED IN EVIDENCEPAGE

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Exhibit 14

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Exhibit 15

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Exhibit 7

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Exhibit 8

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1 (The following proceeding were had:)

2 THE COURTROOM DEPUTY: Court is now in session, the
3 Honorable Lauren Louis presiding.

4 THE COURT: Good morning. You can be seated.

5 In the matter of Case Number 20970, civil, Judge Rodney
6 Smith; KeyRange, Inc., versus KioSoft Technologies, LLC, et al.

7 Counsel, would you please note your appearances for the
8 record.

9 MR. ENGLANDER: Good morning. Joseph Englander from
10 Fowler, White, Burnett on behalf of the plaintiff, PayRange.

11 MR. SMITH: Ryan Smith, Wilson Sonsini, also on behalf
12 of plaintiff.

13 MS. BANTA: Holiday Banta of Ice Miller, on behalf of
14 defendants, KioSoft Technologies and TechTrex.

15 THE COURT: How do you spell your last name?

16 MS. BANTA: Banta, B-A-N-T-A.

17 MR. ROBERTSON: Christian Robertson on behalf of
18 defendants.

19 MR. CAMP: Good morning, your Honor. John Camp, also
20 from Ice Miller, on behalf of the defendants.

21 THE COURT: Good morning, Mr. Camp.

22 MR. CAMP: And with us is Charles Li, who is our
23 client.

24 THE COURT: Welcome, Mr. Li.

25 Okay. So, as a top level instruction, I know we have

1 had a hearing and we talked about a protocol. It has been the
2 practice that whoever is speaking -- meaning the person who
3 would be most impeded by wearing a mask in the courtroom -- is
4 the one that doesn't have to wear a mask while they are
5 speaking.

6 But, for everybody else, we are going to stay masked
7 during the hearing because we have more -- we do have the two
8 filters now on either side of you, which is an improvement, but
9 in an abundance of caution, that has been the practice for
10 everyone.

11 And, when you take it off when you speak, if you are
12 fully vaccinated and fully comfortable to do so, and Alicia
13 should have given you microphone covers --

14 THE COURTROOM DEPUTY: I need to do that.

15 THE COURT: Alicia will give you a microphone cover if
16 you choose to use the podium.

17 If you stay at your spot, you should have a microphone
18 -- or almost all of you will have a microphone. So, if you
19 want to stay there, you may use the microphone, if you choose
20 to do so.

21 So, I can't remember. Are you presenting live
22 witnesses?

23 MS. BANTA: Yes, your Honor.

24 THE COURT: Likewise, the live witnesses will have
25 their own microphone cover --

1 MS. BANTA: And, they are fully vaccinated and
2 comfortable to do so.

3 THE COURT: So then they can testify without the mask.
4 And, all witnesses have been told they have the option
5 to appear personally?

6 MS. BANTA: Yes, your Honor.

7 THE COURT: Okay.

8 And the telephone line is now open, should anyone else
9 from your team prefer to dial in or attend from the lobby.

10 I just want to make sure that folks don't feel
11 uncomfortable with being inside the courtroom.

12 With that, let me --

13 How long, Ms. Banta, do you and your team want for an
14 opening?

15 MS. BANTA: Well, including the testimony of Mr. Li, we
16 estimate probably two hours.

17 THE COURT: Okay. I appreciate that.

18 That is your estimate for your entire presentation?

19 MS. BANTA: That's correct.

20 THE COURT: How long, though, do you need for an
21 opening?

22 I am asking, in a large part, because -- particularly
23 when I have a court reporter, I have structured breaks for her.

24 So, what is your estimate here for an opening?

25 MS. BANTA: 10 or 15 minutes.

1 THE COURT: Okay.

2 And likewise, Mr. Smith?

3 MR. SMITH: The same, your Honor.

4 THE COURT: So, someone had asked about emailing us
5 something.

6 Did you do that?

7 MR. ROBERTSON: Yes, Your Honor.

8 The PowerPoint was just delivered maybe five minutes
9 ago.

10 THE COURT: I have the presentation. All right.
11 You have the floor, Ms. Banta.

12 MS. BANTA: Your Honor, given the fact that the parties
13 have disagreed concerning the admissibility of certain
14 exhibits, I would like to have the parties kind of have that
15 out before we actually start with the presentation, if we
16 could.

17 THE COURT: Thank you.

18 Okay. What is the issue?

19 MR. ROBERTSON: Your Honor, as the order required,
20 defendants served objections to plaintiff's exhibits --
21 plaintiff served -- there are three particular objections that
22 we discussed with plaintiff's counsel via phone yesterday that
23 we were unable to resolve. The first is --

24 THE COURT: Hold that thought for one moment.

25 Please proceed.

1 MR. ROBERTSON: The first objection was an objection to
2 relevance.

3 A number of the documents that plaintiff provided for
4 their exhibits are documents that defendants, KioSoft TechTrex
5 produced during discovery.

6 The Rule 11 motion is to determine what plaintiff or
7 plaintiff's counsel knew at the time of the filing. Rule 11,
8 the Advisory Notes state specifically, "The Court is expected
9 to avoid using the wisdom of hindsight to assess the signor's
10 conduct by inquiring what was reasonable to believe at the time
11 of the pleading."

12 The documents that KioSoft produced during discovery,
13 after the complaint was filed, bears no relevance, has no
14 tendency to prove whether a reasonable person would have made
15 those allegations, furthered those legal theories, or made that
16 finding of purpose that it did, and should not be admitted into
17 -- in this hearing.

18 THE COURT: Okay.

19 MR. ROBERTSON: The second objection, your Honor, is
20 also a relevance objection.

21 This hearing, this case is about two patents, two
22 patents that plaintiff PayRange believes that KioSoft TechTrex
23 have infringed upon. Those two patents are very specific.
24 Yet, a number of the documents produced by plaintiff for
25 today's hearing make no mention of those patents or patents

1 generally, and bear no weight as to whether or not plaintiff
2 knew or had any evidence that our client knew that plaintiff's
3 patents existed, and thus, made the willful infringement
4 allegation in the plaintiff's complaint.

5 So, any of that evidence about issues of -- that don't
6 have the patents involved in it are not relevant to the issue
7 of whether or not they had -- plaintiff had a reasonable belief
8 that KioSoft and TechTrex willfully infringed, as plaintiff
9 alleged in the complaint.

10 The third objection, the final objection, your Honor,
11 we were unable to resolve is a hearsay statement included in
12 plaintiff, PayRange's CEO's -- Mr. Paresh Patel's deposition.

13 In particular, he stated that he had heard from a
14 nonparty in this case that KioSoft TechTrex might have known
15 about the patents. That is an out-of-court statement that he
16 specifically proffered today for truth of the matter asserted;
17 that is that the defendants knew, and thus the willful
18 infringement claim was reasonable.

19 Not only is that out-of-court statement offered for the
20 truth of the matter asserted, that was a statement that was not
21 alleged in the complaint and not added to the record until
22 months after the claim was filed in a deposition.

23 That deposition statement also makes no identification
24 of who that person was who made that statement out of court,
25 when that was, where it was.

1 It is hearsay, and it should not be admitted today.

2 And those are our three objections we were unable to resolve.

3 THE COURT: Okay. What I intend to do is take those
4 objections up if the plaintiff puts on evidence, which I will
5 hear if the defendants meets its burden here at the Rule 11
6 hearing.

7 If it doesn't, then, you know, I will turn to Mr. Smith
8 and his team at that time and see if they want to add something
9 to protect the record.

10 But, failing to meet the standard that you must at this
11 hearing, then I will take those objections up with respect to
12 the admissibility of those documents.

13 But, I appreciate your framing it. It's often -- since
14 I didn't have a chance to explain what I need in an opening, in
15 a hearing like this is that you frame and tell me who's
16 testifying and what it is that you intend to elicit from them,
17 because it is so helpful in determining objections as they come
18 up at a hearing like this.

19 So, that's very helpful, Mr. Robertson. I appreciate
20 it. But, I am not going to -- I am going to take it under
21 advisement, and we will deal with it if we get into plaintiff's
22 evidence.

23 MR. CAMP: Your Honor, point of clarification. Is it
24 your expectation that we would raise those objections as to
25 each piece of evidence, or can we have a standing objection?

1 THE COURT: Yes.

2 MR. CAMP: Thank you.

3 THE COURT: For purposes of the record, that was not
4 clear. My answer was yes -- was you have a standing objection,
5 and you don't have to re-raise it.

6 MR. CAMP: That's what I thought you said, your Honor.

7 THE COURT: You might want a transcript one day.

8 All right. Ms. Banta?

9 MS. BANTA: Yes, your Honor.

10 With regard to why we are here and the importance of
11 these particular allegations in the complaint, and what the
12 plaintiff should have known and didn't know, and what KioSoft
13 should have known and didn't know have to do with a willful
14 infringement claim.

15 A claim for willful infringement carries with it the
16 risk to the infringer of treble damages and payment of the
17 other side's attorney's fees as a worst case scenario.

18 That is why plaintiff is fighting so hard to keep
19 KioSoft in the case, despite the fact that its own witness, its
20 own CEO has admitted, in two different contexts, that the
21 statements made concerning our client's knowledge of these
22 patents in suit, the specific patents in suit, the 994 and the
23 296, was not given to our client, and he knew that.

24 The issue -- well, the opportunities for plaintiff to
25 have informed our client of these patents-in-suit were myriad.

1 Section 287 of the patent statute 35 U.S.C. Section 287(a)
2 specifically calls upon a patentee that, if they want to claim
3 damages for their patent, they must tell the world that they
4 own it.

5 And, they maybe do own it. They may do that in a
6 number of ways: They may put a mark of the patent number on
7 the product, itself; they may put the patent number on their
8 website; or, they can tell somebody -- whether that is a
9 writing, or whether it is oral.

10 None of those activities occurred from plaintiff to
11 KioSoft, and that is why we are here today.

12 With regard to Mr. Li's testimony, he will explain to
13 the Court the circumstances concerning the February 12, 2019,
14 meeting between the parties that is relied on so heavily in the
15 complaint for the allegation that our client knew about these
16 patents-in-suit, and he will discuss the effect of the improper
17 purpose on his business -- that we will get into, in detail --
18 concerning why we believe plaintiff is insisting on maintaining
19 these allegations, and he will address the -- the parties'
20 discussions before and after that February 12, 2019, meeting.

21 THE COURT: Thank you.

22 All right. Mr. Smith?

23 MR. SMITH: Thank you, your Honor.

24 So, there has been no finding in this case that the
25 willful infringement allegations lack merit. KioSoft --

1 KioSoft didn't move to dismiss the allegations of willful
2 infringement.

3 KioSoft didn't move for a more definite statement as to
4 the willful infringement allegation, and KioSoft didn't even
5 move for summary judgment of no willful infringement.

6 So, instead of going -- using Rule 12 and Rule 56, as
7 they should have, to address their disagreements with the
8 allegations, they are trying to use Rule 11 as a surrogate for
9 those proper tools.

10 So, in effect, they are seeking sanctions, monetary
11 sanctions for an allegation that, unless the whole case is --
12 unless summary judgment is granted -- is granted in its
13 entirety in this case, we would be going to trial in a few
14 months, and willful infringement would be presented to the
15 jury.

16 And, willful infringement is an issue for the jury to
17 decide. They decide, yes or no, if this is willful
18 infringement, and the judge can decide in post trial whether it
19 is equitable to increase the damages in any way, or do anything
20 with attorney's fees.

21 So that, at the onset, underscores why this motion
22 makes absolutely no sense. They are effectively -- and I think
23 opposing counsel just said it -- they want you to determine
24 that willfulness is out of the case, and that is an improper
25 way -- that is not what the Rule 11 is designed for, or what

1 could be accomplished.

2 Another important point here is the timing.

3 And this may get to, to some extent, the points raised
4 in the objection, is this case was filed in March of 2020.

5 And, KioSoft didn't bring its motion for sanctions
6 under Rule 11 until November 5th.

7 So -- and so there was this large gap in time. And
8 during that period of time, the parties engaged in discovery,
9 and we took, for example, the deposition of Mr. Li. We
10 obtained a lot of documents from KioSoft and introduced
11 documents.

12 It wasn't -- discovery was not completed by
13 November 5th. But, we were fairly far along. And, by -- by
14 the time -- by the time the period under Rule 11 for PayRange
15 to withdraw its willful infringement allegations had passed, by
16 that point, we already had substantial additional evidence of
17 willful infringement that had come in through discovery.

18 So, what they are asking is -- let's just look at time.
19 Let's just look at the day that the complaint was filed.

20 But, that's not when the motion was filed. The motion
21 was filed in November. So, the question then is when that --
22 when that period of time for the safe harbor expired, which was
23 the first week of November. At that point in time, PayRange
24 could have withdrawn its willful infringement allegation.

25 But, we believe the willful infringements were

1 well-founded to begin with. Certainly, by the time we got to
2 November, there was ample evidence that shows that we had
3 evidence of willful infringement.

4 Another point I wanted to mention is that KioSoft has
5 conflated the idea of notice, which is, as opposing counsel
6 mentioned, set forth in 35 U.S.C. 287.

7 As notice, there is a specific requirement that if you
8 fail to mark your products with a patent number, and you are
9 seeking damages, before bringing a complaint, you have to
10 provide a written notification that identifies the specific
11 patent number, and perhaps different claims, and certainly
12 identifies the accused product. And, that's what you have to
13 get damaged if you had violated the marking statute, if you
14 included damages.

15 Knowledge is different than notice. Knowledge is about
16 what, in this case, KioSoft knew.

17 They don't have to -- there is more than just the one
18 way to have knowledge. It could be by actual notice and
19 written communication.

20 But, as we've alleged, it -- it could come through
21 other means. You could get knowledge on your own, by looking
22 up -- looking up the patents.

23 It is just a few clicks away in terms of typing it into
24 the patent office; PayRange and/or the inventor's name comes
25 up.

1 Or, you could learn it from third parties, which is
2 what happened in this case. And, we have evidence of that. As
3 the CEO of PayRange, Dr. Patel, he believed that he -- a common
4 customer named Wash told him that PayRange -- sorry, that
5 KioSoft knew of the PayRange patents.

6 And certainly, before this Rule 11 motion was filed, I
7 personally checked into that. I -- I called a former executive
8 of Wash and I asked him straight out, "Did KioSoft -- did
9 Charles Li know of the PayRange patents?"

10 And he told me a guy named Mike Wollinger, he told me
11 yes, KioSoft knew of the PayRange patent. That verified what
12 Dr. Patel had said in his deposition.

13 That's hearsay. That's hearsay.

14 There is no doubt about it.

15 But, that was, in part, what formed the basis for our
16 belief that maintained the willful infringement allegations as
17 of the date of this motion, was a proper thing to do.

18 As we get down into the weeds, we will see the
19 interrogatory response which KioSoft says, "Well, that's
20 inconsistent with what is in the complaint."

21 It is absolutely not inconsistent.

22 The interrogatory question was: Did you provide notice
23 to KioSoft, actual constructive notice?

24 And we said, in response, in fact, the actual notice --
25 because the standards under 287 are exacting, we didn't provide

1 the patent number in a written correspondence before the case
2 was filed. That's true.

3 So, we were not contending that there was presuit
4 notice pursuant to Section 287 prior to the lawsuit.

5 But, that has nothing to do with whether or not there
6 was knowledge.

7 And, I also point out, knowledge can be established in
8 two different ways; it can be actual knowledge, or it can be
9 willful blindness. And, that was established in the Supreme
10 Court's Global Tech vs. SEB case.

11 And, this -- the idea is -- and this is exactly what we
12 pled in our complaint, it is -- either KioSoft knew of the
13 patent, based on this meeting they had, and they knew that
14 PayRange had a patented product, and if they knew we had a
15 patented product from the meeting, or, if -- having gone to
16 that meeting, they didn't understand that, there would be no
17 other answer other than willful blindness because at the time,
18 they knew that PayRange was a competitor.

19 PayRange, their CEO told them that they had a patented
20 product. And, they are telling us that despite knowing all
21 that information, they didn't -- they did nothing in response
22 to that. And, in fact, didn't even recognize, even though they
23 were told that we had a patent product, that there was, in
24 fact, a patent product.

25 And then at the end of the day, given this is a Rule 11

1 motion, the doubts must be -- must fall in favor of the signer
2 of the pleading in this case, which is PayRange.

3 This is not a Rule 12 motion that is testing the
4 sufficiency of the pleadings.

5 And again, in Rule 11, even if at the end of the day,
6 the takeaway is well, maybe it seems like these allegations of
7 willful infringement, maybe it's not the strongest case in the
8 world for willful infringement.

9 But, that is not the standard. You could have weak
10 allegations in the complaint. Maybe you'd lose on summary
11 judgment if the opposing party had moved on summary judgment.

12 Maybe you don't win at trial on those.

13 Maybe you lose at post trial. But, merely having a
14 weak allegation is not, in and of itself, grounds for Rule 11.

15 And so what we have here is really a motion for summary
16 judgment. Or, really, a motion for summary judgment just
17 masquerading as something else, and we think that's improper.

18 Thank you.

19 THE COURT: Okay. Thank you, Mr. Smith.

20 All right. Ms. Banta, would you like to begin your
21 presentation?

22 MS. BANTA: Yes, your Honor.

23 With regard to sanctionable conduct under Rule 11,
24 sanctionable conduct can occur when a pleading is filed that
25 has any one of these three problems: First, it has no

1 reasonable factual basis. That is the case here, and we will
2 establish the same.

3 The pleading is based on a legal theory that has no
4 reasonable chance of success, and it cannot be advanced as a
5 reasonable argument to change existing law.

6 That case is met here in this case as well.

7 We will demonstrate that.

8 The pleading has also been filed for an improper
9 purpose such as harassment and to interfere with KioSoft and
10 TechTrex's business in the route -- in the laundry business,
11 specifically.

12 Plaintiff and his counsel have violated not one but all
13 three provisions; specifically, with regard to the factual
14 basis, plaintiff has admitted that it failed to notify
15 defendants of the existence of the patents in suit, after
16 plaintiff claimed the defendants knew about those patents from
17 a February 12th, 2019, meeting.

18 Plaintiff admitted that it did not mark its products,
19 and that is particularly key for the willful blindness theory,
20 because if those products are not marked anywhere, how could
21 our client have learned about them?

22 That was not information available to the public unless
23 you went to the Patent Office website and had a reason for
24 searching it out.

25 THE COURT: Ms. Banta, I didn't find in your papers any

1 case that stood for that proposition that willfulness is
2 dependent on the item being marked.

3 MS. BANTA: That is the Section 287, in order -- in
4 order to have a willfulness finding, it is -- there has to be
5 notice to the person.

6 THE COURT: A different question. That it has to be
7 marked with a patent number?

8 MS. BANTA: No, no, your Honor. It doesn't have to be
9 marked to provide notice. But, the notice has to occur.

10 THE COURT: Right. I just understood your argument to
11 be that there couldn't have been knowledge here because the
12 items were not marked, and I saw the argument.

13 But, I didn't see any legal support for that in the
14 papers. Are you aware of any cases finding that willfulness is
15 unavailable to a plaintiff who does not demonstrate that its
16 products were marked?

17 MS. BANTA: That, I have -- we do not have research for
18 that, your Honor.

19 With regard to the claimed willful infringement theory,
20 based on the fact that these actual facts did not exist, and
21 based on the unpled willful blindness theory, plaintiff's
22 counsel knew or should have known this evidence did not support
23 this theory, and that they then, instead, pleaded willful
24 infringement to kill defendants KioSoft and TechTrex's
25 business, and to dissuade customers from working with KioSoft.

1 And, in support thereof I would like to call Charles Li
2 to the stand.

3 THE COURT: Okay.

4 Mr. Li, come forward, please, and watch your step as
5 you come up.

6 There is a hidden lip that catches witnesses usually
7 when they are leaving.

8 Thereupon,

9 CHARLES LI

10 Was called as a witness and duly sworn, and testified as
11 follows:

12 THE WITNESS: I do.

13 THE COURT: Thank you, sir. Please be seated.

14 State your name for the record.

15 THE WITNESS: Charles Li.

16 THE COURT: Can you spell your last name for the
17 record?

18 THE WITNESS: Li, L-I.

19 DIRECT EXAMINATION

20 BY MS. BANTA:

21 Q. Mr. Li, are you familiar with the lawsuit titled
22 PayRange -- filed by PayRange, Inc., under the caption,
23 PayRange, Inc., versus KioSoft Technologies and TechTrex, Inc.,
24 the case number is 1:20-CV-20970?

25 A. Yes, I am familiar.

1 Q. Is that the case for which you are appearing today?

2 A. Yes. It is.

3 Q. What is your role at KioSoft and TechTrex?

4 A. I am the president of both companies, and head of the both
5 companies.

6 Q. Is it okay with you if I just refer to KioSoft instead of
7 KioSoft and TechTrex each time I am referring to the
8 defendants?

9 A. Yes, that's fine.

10 Q. Okay. Can you explain to the Court how you were involved
11 with this lawsuit?

12 A. As head of the company, I am in charge of leading the
13 lawsuit.

14 Q. Have you seen the complaint filed by PayRange in this case?

15 A. Yes, I have.

16 Q. Would you mind opening your exhibit binder to its
17 Exhibit 11.

18 A. Okay.

19 Q. Can you please identify that document for the Court?

20 A. Yes, this is the PayRange's claim.

21 Q. Have you seen that document before?

22 A. Yes, I have.

23 Q. Can you leaf through it and confirm that there are no pages
24 missing, as far as you can tell?

25 A. Yes. I believe this is the document.

1 MS. BANTRA: Your Honor, we move for admission of
2 Defendants' Exhibit 11.

3 THE COURT: Which is the complaint?

4 MS. BANTA: Yes, your Honor.

5 THE COURT: Okay. I mean, this is part of the docket.

6 MS. BANTA: Okay.

7 THE COURT: Well, we don't normally admit pleadings on
8 the docket without them being on someone else's docket and as a
9 matter of judicial notice.

10 I mean, the Court will take notice of docket entry
11 No. 1, which is the complaint in this case.

12 MS. BANTA: Great. Thank you.

13 BY MS. BANTA:

14 Q. Mr. Li, what is your understanding of the claims brought
15 here in this lawsuit by PayRange?

16 A. After the complaint, etcetera, we studied -- I think
17 PayRange is trying to put a patent that they have that is
18 something different than what we do, and trying to claim that
19 we have -- we are doing the same.

20 Q. Did PayRange allege that KioSoft willfully infringed on the
21 PayRange patents?

22 A. Yes, they have.

23 Q. Could you tell the Court what the filing date was -- listed
24 at the time of Exhibit 11 is?

25 A. March 3, 2020.

1 Q. Are the patents that PayRange alleged your company has
2 infringed U.S. patent numbers 9659296 and 913494?

3 A. Yes, it is.

4 Q. If I refer to those as the patents-in-suit, will you
5 understand what I mean?

6 A. Yes, I will.

7 Q. When was the first time you heard about the
8 patents-in-suit?

9 A. The first time -- excuse me, that I heard about the patents
10 was when I received an email from -- I believe it was a legal
11 firm, informing me that this suit has -- I'd been sued, the
12 company has been sued, and they have attached the patents in
13 the email and asked if I needed any help in defending against
14 this lawsuit.

15 Q. Paragraph 22 of the complaint states that a meeting on or
16 about February 12, 2019, occurred between senior executives of
17 the PayRange and defendants in Portland, Oregon.

18 Do you see that statement?

19 A. Yes, I do.

20 Q. Did you attend that meeting?

21 A. Yes, I did.

22 Q. How did that meeting come about?

23 A. Twice a year, we have industry gatherings or conferences
24 called MLA, MultiHousing Laundry Association.

25 We are a member. And also PayRange is a member.

1 So, the first year that PayRange attended the meeting, they
2 have requested, through my head of sales, Larry, to have a
3 meeting.

4 But, typically, at these conferences, we -- our schedule is
5 full. So, we could not arrange a time to meet.

6 So, they requested, if possible, after the conference,
7 could we set up a time to meet?

8 And, there was an opportunity. So, we contacted -- Larry
9 contacted PayRange, and we set a time.

10 Q. Okay. Did you go to Portland specifically for the meeting
11 with PayRange?

12 A. No. In Portland, we have another customer, Coin Meter. We
13 have an immediate meeting with them. So, we took the
14 opportunity to, while visiting our customer, to meet with
15 PayRange.

16 Q. Paragraph 22 goes on to say that at that meeting, the
17 parties discussed a potential business and licensing
18 relationship. Did you discuss technology licensing with
19 PayRange at that meeting?

20 A. For sure, we discussed technologies. The purpose of the
21 meeting was to see could we come up with a win-win situation
22 for both companies where we can use both of our business or
23 technology to work together and to get into the market faster.

24 It is kind of awkward here, right now, because we are in a
25 lawsuit. But, we really didn't start off that way with

1 PayRange. Initially, the relationship was very good.

2 We saw PayRange at the MLA, typically at these kind of
3 conferences. Customers are -- "competitors" would get
4 together. We are at the bar. It is at a hotel. We drank
5 together. We even helped set up golf games for their heads of
6 their sales. We have been in the industry a whole lot longer
7 than they have. So, it was supposed to be a very open meeting.
8 We looked to it -- not as a confrontational -- as we are
9 currently in, but more to, since we are both in this industry,
10 can we find something to do?

11 I don't remember using the word "licensing."

12 We used words such as "Can we find anything that is
13 complementary; can we find anything that is a win-win."

14 Et cetera.

15 Q. Who did you speak with from PayRange during that meeting?

16 A. At that meeting, we -- initially, we met at their offices.
17 It was -- Paresh was there, and there was a -- I can't remember
18 his name -- there was an acting COO. Apparently, the original
19 COO has left the company. So, we met with him.

20 Paresh had a flu at that meeting. So, he couldn't attend
21 the dinner. So, the COO, acting COO and we went out and we met
22 at the dinner location with -- apparently, this new CFO, acting
23 CFO of PayRange. We had dinner together.

24 Q. Okay. Paragraphs 35 and 49 of the complaint indicate the
25 patented technology was discussed at that meeting. Did anyone

1 from PayRange mention the patents-in-suit at that February 12,
2 2019, meeting, or the dinner thereafter?

3 MR. SMITH: Objection, hearsay.

4 THE COURT: Overruled.

5 THE WITNESS: If -- if patents were mentioned, it would
6 be very clear in my mind. The meeting was about -- we went
7 through PayRange -- Paresh put up a presentation and said,
8 "This is what we do."

9 And, we discussed -- I am not sure if we put a
10 PowerPoint up. But, we discussed, "This is what we do."

11 And, we also talked about -- they were new in the
12 laundry industry, and they asked -- Paresh asked us, "Why are
13 you guys successful?"

14 Why are you guys number one?"

15 So, we talked to them about why we are number one. We
16 even -- after, at dinner, talked about how their installation,
17 which was at Wash, which was their original customer, and
18 really, the main customer they had, how was the installation
19 going. They talked about the issues. They talked about how
20 important laundry was to them. The CFO specifically said, "It
21 has been very, very profitable and important for them."

22 And, as their current vending market, which was the
23 original target they were going after, wasn't very
24 successful -- so, they really wanted to get into the laundry
25 space, and that is what we talked about, about business. Not

1 patents.

2 Q. Did the word "patent" come up at any time during the
3 meeting, or during the dinner afterwards?

4 A. No words of patent ever came up, at the meeting.

5 Q. Did the word "proprietary" come up at any time during the
6 meeting or at this dinner?

7 A. No. Proprietary -- if the word "proprietary" came up at
8 the meeting?

9 No.

10 Q. Did anyone from PayRange mention the patents-in-suit either
11 in a conference or correspondence prior to your meeting with
12 PayRange?

13 A. No. They did not.

14 Q. Did anyone from PayRange mention the patents-in-suit either
15 in a conference or correspondence after your meeting with
16 PayRange, and before the complaint was filed on March 3rd,
17 2020?

18 A. No.

19 Q. Was there anything discussed with PayRange before, during,
20 or after the meeting that led you to have a belief that it was
21 highly probable that the technology discussed was even covered
22 by patents?

23 A. This is the -- we were not the first to come up with a
24 payment app. In the marketplace, there were other competitors.
25 We were -- PayRange may be the newest entrance, but we were

1 probably the second newest entrance to the market.

2 We know, for sure, Greenwald, another competitor, had an
3 app.

4 We know ESD, another competitor, had an app.

5 We know Alliance, Speed Queen, SpyderWash -- today, I don't
6 know of a single company in this country who doesn't have an
7 app.

8 So, how would I think that everybody has this app, that
9 PayRange had a patent?

10 And, we met with PayRange at the time. And, at the end of
11 our discussion, it was -- we couldn't find anything
12 complementary, but it was "Hey, Paresh, you can -- guys, since
13 you know what we do, can you guys think among yourselves and
14 see -- can you come up with a way to work together?"

15 Because honestly, if anything, they wanted our technology.
16 It wasn't that they were saying, "Hey, here is -- you have to
17 take our technology."

18 It was -- even his last emails after the meeting, he says,
19 "Hey, we find that our business is complementary, and we want
20 your hardware. Can we put our stuff on top of your hardware?
21 And I will pay you."

22 It wasn't, "Hey, you need to pay me because I have the
23 following things."

24 It wasn't that kind of conversation.

25 And, as I said, I repeat, it wasn't a confrontational

1 meeting.

2 So, even afterwards, PayRange -- Paresh sent me an email
3 saying, "Hey, we find our product complementary. We would like
4 to put on this."

5 And my response was, "I don't know what we get out of it."
6 We had this hardware."

7 The future of this industry is not "Oh, make a
8 payment."

9 It is about IOT. It is about how do you bring
10 information to the route operator?

11 How do you bring air conditioning?

12 How do you reset machines?

13 How do you reduce the travel time?

14 How do you help them to implement faster?

15 How do you provide all those solutions; laundry carts,
16 pay at the machine, all those things?

17 And Paresh, he recognized it, that we had all these
18 things.

19 So, he asked, "Can I put my software on top of your
20 hardware so that we can work together, and I will pay you."

21 But, we also do the same thing. So why do we need it?

22 So they did follow-up, asking me to put their software
23 on top. Also, they wrote another email. Later, Paresh sent me
24 another, "Hey, can we buy you? Can we do a merger?"

25 So, again, offering to work with us. But, at no time

1 did he say, "Hey, I have this patent. You need to license my
2 patent."

3 There was never those conversations. It was a business
4 meeting.

5 And, we stayed. And, even in my last response, "Hey,
6 Paresh, not now, but hey, let's keep talking. Are you
7 available for dinner?"

8 Let's set up a time when you are in my area."

9 That was how it ended. It was a friendly meeting, and
10 he responded saying, "Hey, if I have time, I will."

11 "Okay. If you are in the right area."

12 So, it was not a confrontational meeting. There was no
13 discussion of patent. It was all about how can we work
14 together better?

15 Q. Yet, paragraphs 39 and 53 of the complaint state that
16 "KioSoft and TechTrex had knowledge of PayRange, its products,
17 and its patents."

18 Did KioSoft have any knowledge of the patents-in-suit
19 before PayRange filed its lawsuit?

20 A. No. That -- again, we -- we met. We typically go to the
21 same shows, same conference. We visit each other's booths. We
22 talked. It was a friendly relationship.

23 We did -- we were planning at the next MLA to golf
24 together. Not with Paresh, but with his head of sales. It was
25 that type of relationship, and patents were never mentioned.

1 We always kept in our mind, "Hey. They are a bunch of nice
2 guys. Maybe we can do something together."

3 But it was -- you know, typically, sometimes in this
4 industry, you work together and you -- even if you're
5 competitors, quite often, maybe two or three years later,
6 something can happen that you work together.

7 So, we kept the channel open. It was never a discussion of
8 patents.

9 Q. To your knowledge, did anyone at KioSoft have knowledge of
10 the patents-in-suit before PayRange filed its lawsuit?

11 A. Of course. When the lawsuit started, I didn't send an
12 email to all my staff, but my senior management staff, we got
13 together because of course, we have to put our heads together
14 and start answering questions, etcetera.

15 And, of course, I asked the question, "Hey. Did any of you
16 know about this?"

17 Nobody knew about this.

18 Q. Instead of telling KioSoft that its products infringe on
19 PayRange's patents, did Dr. Patel say in a meeting, after the
20 meeting, February 12, 2019, meeting --

21 THE COURT: Hold on, Ms. Banta. I don't know where
22 you're going, but you are already leading him. So, try again.

23 BY MS. BANTA:

24 Q. Did Dr. Patel state in an email after the February 12,
25 2019, meeting that KioSoft's product and PayRange's solutions

1 are very complementary?

2 MR. SMITH: Objection, hearsay.

3 THE WITNESS: Well --

4 THE COURT: Hold on. Hold on.

5 When there is an objection, you have to wait until it
6 is ruled on.

7 And the objection was?

8 MR. SMITH: Hearsay.

9 THE COURT: Overruled.

10 THE WITNESS: I received an email, as I said, from
11 Paresh. Again, the meeting was positive. Again, we didn't
12 have a solution at that meeting of how to work together.

13 The meeting was on how to work together, but he was to
14 come up with a solution.

15 So, he wrote me an email and said, "Hey, the solution
16 is 'complementary.'"

17 He even drew up a chart and said, "Hey, here is why we
18 are complementary."

19 And the chart was saying, "Hey, you have fantastic
20 hardware. These hardwares are PCI-certified, credit
21 card-certified. These take millions of dollars to make.

22 "And then we have an operational server that helps you
23 install faster, manage installation, error messages, have coin
24 collections, route management -- we've got all these
25 features -- and -- and of course, I like to put my app on top

1 of it."

2 "What does your app do?"

3 "Oh, it makes payments."

4 "Oh, but we make payments."

5 "There is -- everybody has an app that makes payments."

6 "But, nobody has our hardware and our system that does
7 this. So of course, it is complementary."

8 Of course, I understand, that's why he wants to pay us,
9 to put his software on our hardware, as he states in the email.

10 But, the last point we made at the meeting was "Paresh,
11 what could we get out of it?"

12 "It has to be a win-win situation. What do we get out
13 of it?"

14 And, that email doesn't clarify. So, I had to say,
15 "Paresh, it is unclear."

16 As that email said, "I don't know what we get out of
17 it. I know what you get out of it. I don't know what we get
18 out of it."

19 But again, I repeat, "Let's stay open. Hey, when you
20 are available in my area for dinner, let's meet."

21 Q. So, could you turn to Exhibit 14 in your binder, please?

22 Could you identify that document?

23 A. Yes. This is the email from Paresh to myself and Larry
24 about -- again, talking about he felt that our products were
25 complementary, and he wanted to work together.

1 He even attached a chart saying how we could work together,
2 as we stated, and he stated he is willing to pay us to do that.

3 Q. Does that email mention anything about patents?

4 A. No, it does not.

5 Q. Does it mention anything about proprietary technology?

6 A. No, it does not.

7 MS. BANTA: Your Honor, defendants move for admission
8 of Exhibit 14.

9 THE COURT: Mr. Smith?

10 MR. SMITH: No objection.

11 THE COURT: So admitted.

12 (Exhibit No. 14 was received in evidence.)

13 BY MS. BANTA:

14 Q. Could you turn to Exhibit 15 --

15 THE COURT: Mr. Smith, you know I don't have a copy of
16 these exhibits, right?

17 MS. BANTA: Mr. Robertson?

18 THE COURT: Mr. Smith, do you have a copy of the
19 exhibits?

20 MR. SMITH: I do.

21 THE COURT: Just tell you what. It is okay. Not to
22 hold up the hearing, but just know I haven't seen them. So if
23 you want me to, before it is all said and done --

24 Is the whole thing for me?

25 MR. ROBERTSON: Yes, Your Honor.

1 THE COURT: Okay. Thank you.

2 BY MS. BANTA:

3 Q. With regard to Exhibit 15, could you please identify that
4 document?

5 A. I think that is a continuation of our discussion after his
6 email.

7 So, in that email, he asks -- again, email is -- it's a
8 very friendly email -- he said, "Sorry I couldn't -- we
9 couldn't talk very privately" -- because he had the flu.

10 He just talked to me at his office. He asked if he could
11 buy us, a portion, et cetera.

12 But, as I stated there, as well, I still didn't see what
13 benefit between -- "Whether if you buy me, if there is
14 something between our companies that adds value."

15 "One plus one becomes three. I think it makes sense."

16 "But, we have everything. What value do you add?"

17 So, I didn't see an opportunity to work together. And, we
18 are selling KioSoft -- as a company, we went from a
19 million-dollar company to -- in sales -- to 40-some million in
20 three or four years.

21 We are going like a rocket into the market. Everybody is
22 working long hours. But, everybody was having a great time.
23 Success makes -- makes the company and everybody happy.

24 So, I said, "Hey, we are having too much fun right now. I
25 don't think it is the right time. But, when you are available

1 in Toronto or in Florida, those are our two offices. Let's
2 meet together, let's talk."

3 MS. BANTA: Your Honor, I move for the admission of
4 Exhibit 15.

5 MR. SMITH: No objection.

6 THE COURT: So admitted.

7 (Exhibit 15 was received in evidence.)

8 MS. BANTA: Mr. Li, you can put away your binder for
9 now.

10 BY MS. BANTA:

11 Q. Prior to the filing of the lawsuit, had you seen a blue key
12 device?

13 A. Yes. A blue key device is a -- it is a -- it is a PayRange
14 device. But, at the shows, they have this person dressed up as
15 a big blue key. So, you cannot miss the blue key.

16 Q. Okay. Was that blue key -- whether as a person, or
17 whatever you saw -- was it marked with the numbers of the
18 patent?

19 A. No, it was not.

20 Q. Prior to the filing of the lawsuit, did you receive any
21 emails from third parties informing you about the
22 patents-in-suit?

23 A. No, I never received any emails about the patents.

24 Q. Paragraph 25 of the complaint states that "Defendants have
25 either willfully and wantonly infringed the patents-in-suit, or

1 have recklessly avoided knowledge of their own infringement."

2 Does KioSoft have an internal rule against researching
3 patents owned by third parties?

4 A. We have no policy that says we should not research patents.

5 Q. Does KioSoft have a policy of prohibiting an employee from
6 searching for KioSoft competitor patents if an employee thinks
7 a competitor might have a patent?

8 A. No, we do not.

9 Q. Does KioSoft encourage its employees not to research
10 third-party websites or other third-party material in order to
11 avoid learning about patents that that third party may own?

12 A. Any technology company that does not use websites or web
13 search will go out of business very fast. We do regularly
14 search our competitors.

15 Q. Have you ever told an employee not to investigate whether a
16 KioSoft competitor had a pattern?

17 A. No, I have not.

18 Q. Have you ever told an employee to ignore the fact that a
19 KioSoft competitor had a patent?

20 A. No, I have not.

21 Q. Could you turn to Exhibit 12 in your binder?

22 A. Okay.

23 Q. Could you please identify that document for the Court?

24 A. These are our answers to PayRange's claims.

25 Q. Have you seen that document before?

1 A. Yes, I have.

2 MS. BANTA: Your Honor, I -- I would ask the Court to
3 take judicial notice of docket entry -- I believe it was 44.

4 THE COURT: Okay. All right.

5 (Judicial Notice of Docket Entry 44)

6 BY MS. BANTA:

7 Q. KioSoft and TechTrex's counterclaim states, at paragraph 63
8 that "The complaint was the first notice that KioSoft or
9 TechTrex had concerning PayRange's 296 and 994 patents.

10 Do you see that statement?

11 A. Yes.

12 Q. Is that an accurate statement?

13 A. It is an accurate statement.

14 Q. Are you familiar with CSE Service Works?

15 A. Yes, I am.

16 Q. What is CSE?

17 A. CSE is the largest laundry route operator in the United
18 States, probably in the world. They have about 55 percent
19 market share, with about 1.5 million laundry machines, and they
20 are our customer.

21 Q. Could you turn to Exhibit 7 in your binder, please.

22 Could you please identify that document for me?

23 A. This is an -- a letter from PayRange to CSE's CEO.

24 Q. Is it from PayRange or PayRange's counsel?

25 A. Sure. PayRange's counsel, sorry.

1 Q. Have you seen this letter before?

2 A. Yes, I have.

3 Q. What -- how did you learn about the letter?

4 A. CSE's -- our main contact contacted us and sent me a copy
5 saying, "Hey, what's going on?"

6 And, they wanted indemnity from us.

7 Q. Does PayRange state in that letter that KioSoft has
8 willfully infringed on PayRange's patents?

9 A. Yes, it does.

10 MS. BANTA: Your Honor, I move for the admission of
11 Exhibit 7.

12 MR. SMITH: Objection, lack of foundation.

13 THE COURT: What is the shortcoming in foundation that
14 has been laid here?

15 MR. SMITH: Well, he said he got -- he said -- I think
16 the only testimony was just that he received some copy of this
17 letter from somebody. I don't think he actually said that this
18 was, this looks -- that is a version that, according to -- at
19 the top, what was in the -- in the complaint, I don't think he
20 ever said he got -- he got this exhibit to the complaint.

21 THE COURT: Is there a challenge to the authenticity of
22 this letter, from you?

23 MR. SMITH: No.

24 THE COURT: Then the objection is overturned.

25 (Exhibit No. 7 was received in evidence.)

1 BY MS. BANTA:

2 Q. Are you familiar with Wash Multifamily Laundry Services?

3 A. Yes.

4 Q. What is Wash?

5 A. Wash is another route operator in the market. They are the
6 second-largest route operator in the U.S. And, they also have
7 a route owner in the Canada, Coinamatic, which is -- they own a
8 hundred percent of.

9 Coinamatic is the largest route operator in Canada, with
10 85 percent market share. Wash is the second-largest route
11 operator in the U.S.

12 They have about 500,000 machines, about 25, 30 percent
13 market share.

14 Q. Has KioSoft ever done business with Wash?

15 A. Yes. In -- in Canada, we are almost exclusive to
16 Coinamatic and Wash, who used to be also -- actually, PayRange
17 used to work with them, but now, Wash -- before PayRange worked
18 with us, and now, after, PayRange works with us.

19 Q. Could you turn to Exhibit 8 in your binder, please.

20 A. Yes.

21 Q. Could you identify that document, please?

22 A. That is a letter from PayRange's counsel to Wash's counsel.

23 Q. And how did you learn about this letter?

24 A. He and I received it from our contact in Wash, again,
25 asking "What's going on?"

1 And of course, again, asking for indemnity.

2 Q. Does PayRange state in this letter, Exhibit 8, that KioSoft
3 willfully infringed on PayRange's patents?

4 A. Yes, it did.

5 MS. BANTA: Your Honor, I move for the admission of
6 Exhibit 8.

7 MR. SMITH: Same objection as to foundation as to the
8 last exhibit.

9 THE COURT: The objection is noted and overruled.
10 So it is admitted.

11 (Exhibit No. 8 was received in evidence.)

12 BY MS. BANTA:

13 Q. Mr. Li, have you seen similar infringement allegations from
14 PayRange against KioSoft posted online?

15 A. Online, yes. Online, social media, and I guess every time
16 they meet our customers, they talk about it, too.

17 Q. Could you turn to Exhibit 9 in your binder, please.
18 Could you identify this document?

19 A. Yes. It looks like some press release from PayRange
20 regarding a patent infringement lawsuit against KioSoft.

21 Q. Have you seen this article before?

22 A. Yes, I have.

23 Q. Does it state that KioSoft blatantly disregarded PayRange's
24 patents?

25 A. Yes, it does.

1 Q. Have any customers mentioned this or similar articles from
2 PayRange to you?

3 MR. SMITH: Objection, calls for hearsay.

4 THE COURT: The question is "Has any customer mentioned
5 seeing this article to you?"

6 MS. BANTA: Yes, your Honor.

7 THE COURT: Overruled.

8 THE WITNESS: Of course. When the lawsuit states
9 \$50 million in damages, they are concerned. They ask, "How are
10 you doing? What's going on?" Et cetera.

11 It is usually the -- it's usually the second topic
12 after "hello."

13 MS. BANTA: Okay. No further questions, your Honor.

14 THE COURT: Cross?

15 MR. SMITH: Thank you, your Honor.

16 CROSS-EXAMINATION

17 BY MR. SMITH:

18 Q. Mr. Li, when was the first time you heard of PayRange?

19 A. I don't know the exact time, but I was at a show in
20 Victoria, Canada. It was a vending show, a vending machine
21 show. And, I saw their product at that show.

22 Q. And now, in your direct examination, you mentioned a
23 customer named CSE. Do you recall that?

24 A. Yes.

25 Q. Do you currently have an agreement in place with CSE?

1 A. We had one agreement in place. It has expired.

2 So, we have no written agreement in place today.

3 Q. Is CSE still a customer?

4 A. They are a customer.

5 Q. So, it is correct, CSE didn't terminate your agreement,
6 right?

7 A. CSE did terminate the agreement --

8 Q. Did they --

9 A. -- but they are still buying.

10 Q. So as of today, CSE is still a customer, right?

11 A. My definition is if they are still buying, they are a
12 customer.

13 Q. And, you mentioned -- now, did someone call you on the
14 phone from CSE and say they were terminating your agreement?

15 A. Yes.

16 Q. Who?

17 A. I believe Brad -- sorry. I just can't remember his name.
18 His last name could be different. I think it was Brad. His
19 last name was Payne.

20 Q. Is there a difference between terminating an agreement and
21 letting it expire?

22 A. He terminated the agreement. He had a six-month
23 expiration. So, after it terminated, it was good for six
24 months, and the six months has passed, so it has expired.

25 MS. BANTA: Your Honor, I don't see the relevance of

1 this line of questioning to this hearing. It is unfair
2 competition.

3 THE COURT: There is not a question -- or answer
4 coming.

5 Go ahead, Mr. Smith.

6 BY MR. SMITH:

7 Q. Now, I believe in your direct examination you mentioned
8 that both CSE and Wash had requested indemnification from
9 KioSoft; is that correct?

10 A. Yes.

11 Q. Did KioSoft provide indemnification to CSE and Wash?

12 A. We did provide -- my understanding -- again, this is a lot
13 of legalese here, but I believe we provided indemnification to
14 CSE, but for Wash -- because they developed their own app. So,
15 CSE was -- the whole solution that they were carrying was fully
16 developed by us. But, for Wash, part of the solution, that
17 application was developed by their own developers.

18 We don't know how their -- that app works, other than
19 generically hey, it starts the machine.

20 But, we are not involved in how they develop, how they
21 code. They use a different language. They use different
22 resources.

23 So, we said, because we -- you don't -- we don't have that,
24 you're not fully using ours, we did not fully -- we have not
25 indemnified them.

1 Q. So, Wash asked you for indemnification, but you said no,
2 something to that effect?

3 MS. BANTA: Again, relevance, your Honor.

4 THE COURT: To the extent it was relevant on direct, it
5 is, to the same limited value on cross. But, I will limit it
6 to what you brought up. Overruled.

7 You can answer.

8 THE WITNESS: So, could you ask the question again,
9 sir?

10 MR. SMITH: Certainly.

11 BY MR. SMITH:

12 Q. So, Mr. Li, Wash asked for indemnification, but you said
13 no, right?

14 A. I believe we did not provide indemnification to Wash.

15 Q. And how much, if any, has the indemnification of CSE cost
16 your company?

17 THE COURT: Mr. Smith, I am going to ask you to proffer
18 where you are going.

19 MR. SMITH: Well, your Honor, they raised this
20 suggestion that there was indemnification, and that somehow
21 caused harm, and I am trying to understand whether this
22 factually materialized in any sort of financial harm.

23 THE COURT: Because you view it as relevant to the
24 sanctions motion?

25 MR. SMITH: I mean, they brought up this issue of

1 indemnification, and I just wanted to close the loop on what
2 was the impact of this.

3 THE COURT: So, to be clear, at the outset, they did
4 bring it up, and I let you examine to challenge the veracity of
5 the statement. But, how much they have indemnified, or when,
6 or any other detail, I don't -- if you can proffer a grounds on
7 which, if any, of that would be relevant --

8 MR. SMITH: I can, your Honor. I will move on.

9 BY MR. SMITH:

10 Q. So, Mr. Li, you mentioned there was -- in your direct
11 examination -- I believe it was in the March -- the March --
12 sorry -- the 2019, the meeting with PayRange, right?

13 A. Can you repeat that?

14 Q. You mentioned the 2019 meeting with PayRange. That is your
15 testimony, is that right?

16 A. Yes.

17 Q. So, you agreed there was a meeting with PayRange at his
18 offices in 2019?

19 A. Absolutely.

20 Q. And, at the meeting, did you talk about the PayRange
21 products?

22 A. We did not fully talk about the PayRange product. I only
23 talked -- I only know of the products that Paresh Patel
24 mentioned in his presentation.

25 Q. So, Paresh -- and Paresh Patel is the CEO of PayRange?

1 A. That's correct.

2 Q. And you would agree Paresh Patel made a presentation about
3 at least some of PayRange's products, right?

4 A. That's correct.

5 Q. Did you take any notes from the meeting?

6 A. I don't think so.

7 Q. How many meetings do you think you had since the meeting
8 with PayRange in terms of other business meetings?

9 A. With PayRange, since that meeting?

10 Q. Well, wouldn't you say you have had a lot of different
11 business meetings with a lot of different companies since this
12 meeting with PayRange in 2019, right?

13 A. Can you repeat the question?

14 I am not understanding you.

15 Q. Well, since you had your meeting back in 2019 with
16 PayRange, you have had a lot of meetings with a lot of other
17 businesses to discuss a lot of other topics about KioSoft and
18 this business, right?

19 A. Of course.

20 Q. And, you don't remember every word that was said at that
21 meeting with PayRange in 2019, do you?

22 A. Of course not. Nobody remembers. I don't have a
23 photographic memory. But, the important words stand out. If
24 he said "patent," that would stick in my memory.

25 Q. And -- well, let me ask you this: Is it your testimony

1 that Mr. -- Dr. Patel never mentioned that their, PayRange's,
2 solution, was patented, is that your testimony?

3 A. That is absolutely my testimony.

4 Q. And you are a hundred percent sure he never said those
5 words?

6 A. I am a hundred percent sure he never said those words.

7 Q. And let me show you -- I will show you a copy of your
8 deposition --

9 Let me show you a copy of his deposition transcript.

10 Page 237 --

11 MR. SMITH: And your Honor, I apologize. We sent the
12 exhibits electronically to chambers. We did not deliver hard
13 copies.

14 May I approach the witness?

15 THE COURT: Do you want --

16 MR. SMITH: May I approach the witness with this
17 deposition transcript?

18 THE COURT: For what purpose?

19 MR. SMITH: I am going to ask him about the --

20 THE COURT: It is not his deposition, right?

21 MR. SMITH: That is true.

22 THE COURT: So --

23 MR. SMITH: But, I am just going to ask him if he was
24 aware of this testimony, and if he thought Mr. -- had an
25 opinion that Dr. Patel was truthful or not.

1 THE COURT: So generally, testimony about the
2 credibility of another witness is not admissible. So, that's
3 why I am asking where you're headed.

4 MR. SMITH: Yes, that's where I'm headed. That is why
5 I was going to show him the testimony. But, if it is not
6 permitted, then okay.

7 BY MR. SMITH:

8 Q. And would you agree, though, that you -- even back in 2019,
9 you considered PayRange to be a competitor of KioSoft?

10 A. Yes. They were a competitor of KioSoft.

11 Q. And I believe you mentioned that basically, you both had
12 the same technology, and that --

13 A. I absolutely disagree.

14 Q. But, you mentioned in your testimony that you didn't think
15 PayRange had anything complementary that it could provide to
16 KioSoft, so there was no reason to work together in a
17 relationship?

18 A. No, that is not what I said. I said, for sure, our
19 technology is complementary to him. I didn't see anything for
20 him to add any value to me, or KioSoft.

21 Q. That's because you already had a mobile app, right?

22 A. That's all we had. So -- yes. I had a mobile app.

23 Q. So -- so, in other words, when you went to the meeting in
24 2019, you knew that your competitor had a mobile app, and you
25 also had a mobile app, right?

1 A. That's correct.

2 Q. And -- and I believe you said in your direct testimony that
3 you -- you didn't have any policy that prohibited any of your
4 employees from checking for patents or doing investigations
5 into property -- intellectual property, right?

6 A. That's correct. We do not have any policy that prevents
7 people for searching for patents.

8 Q. And I believe you also said that you didn't ask all of your
9 employees whether or not they had knowledge of PayRange's
10 patents, right?

11 A. No. I stated that after the lawsuit had started, and we
12 were preparing, of course, all of the senior managers got
13 together because we had a lot of questions. We had to put our
14 heads together and answer, go through our emails, and et
15 cetera.

16 At that time, I asked my senior management team did anyone
17 know about PayRange's patents?

18 And the answer was no.

19 Q. But, you didn't ask everybody to comment, right?

20 A. We have 200 people. As I said, I did not send an email to
21 all of our staff and say, "Hey, did you guys know about
22 PayRange's patent?"

23 Q. Even though you knew that under your company policies, they
24 could have searched for patents, and they could have learned
25 about the PayRange patent, right?

1 A. I don't send email out to my warehouse staff asking, "Hey,
2 did you know about PayRange's patent?"

3 Q. Had you had, at the time, at least back in -- well, let me
4 strike that.

5 You don't have any formal training about avoidance of
6 intellectual property infringement, right?

7 A. No, we do not have -- I, personally, do not have any formal
8 training on how to avoid patent, prior to this lawsuit.

9 Q. And, prior to this lawsuit, you did no investigation into
10 looking for specific patents in the laundry space, right?

11 A. We have competitors. PayRange, as I said, was the newest
12 competition.

13 We had ESC, Greenwald, SpyderWash, CTI.

14 I -- yes. You are absolutely correct. We did not do any
15 special searches for laundry space for patents.

16 Q. And, it is true that KioSoft has copied stickers that
17 PayRange was using to put on laundry machines at Wash, right?

18 A. Yes. Again, I think this is a misconception about the
19 stickers. They were asking us how is the stickers made?

20 Where is it?

21 The reason is Wash has asked us Hey, can you guys come up
22 with a plan to take out the PayRange product and put ours in?

23 And, as part the deployment, it is very hard to remove a
24 sticker from a washer and dryer. It is easier to say, you
25 know, the size of that and just stick ours over it and cover

1 it. And, that's the easiest way to do it.

2 So, PayRange's stickers does not contain the same
3 information that we have. So, we could not copy PayRange's
4 stickers. They don't have the QR code like we do. So, they
5 have no benefit to copying a PayRange sticker.

6 Q. So, your testimony is that KioSoft never copied any
7 stickers of PayRange regarding the mobile app?

8 A. Again, copying, meaning taking -- what is the size, so we
9 can cover it?

10 Is that copying?

11 But, as I stated, we built it so that we are similar, so we
12 can cover over what they have.

13 MR. SMITH: Well, let me show you an exhibit.

14 This is PayRange Exhibit Number 18.

15 And your Honor, may I approach?

16 THE COURT: Sure.

17 MS. BANTA: Your Honor, we would just like to note the
18 same objection, on relevance.

19 THE COURT: Which --

20 Hold up one second.

21 Which objection does this fall into?

22 MS. BANTA: Mr. Robertson.

23 MR. ROBERTSON: Number two, your Honor, this is --
24 document doesn't mention the patent-in-suit or any patent at
25 all. So, the issue --

1 THE COURT: And it is the same argument that has been
2 raised in your briefing?

3 MR. ROBERTSON: Yes, Your Honor.

4 THE COURT: Overruled.

5 BY MR. SMITH:

6 Q. And now, do you see, we have Exhibit 18 being projected
7 here. Do you see the screen?

8 A. I see the screen, but I cannot read anything on the screen.

9 Q. Is that -- is that any better?

10 Or no?

11 Do you want me to show --

12 Your Honor, can I approach the witness and hand it to
13 him?

14 THE COURT: Yes.

15 BY MR. SMITH:

16 Q. Mr. Li, do you see -- do you see Exhibit 18 in front of
17 you?

18 A. Yes.

19 Q. And do you see this as an email that is dated June 3rd of
20 2017?

21 A. Yes.

22 Q. And you were one of the recipients of this email; is that
23 right?

24 A. Yes.

25 Q. And this is talking about the PayRange sticker we were

1 talking about?

2 A. Can I see it?

3 Q. Sure.

4 A. Yes.

5 Q. And, now, do you see -- if we go to the third email down,
6 there is an email from Kenneth Urquhart?

7 A. Urquhart.

8 Q. I apologize. There is an email from -- the third email
9 down, an email from Ken Urquhart to yourself and others at
10 KioSoft?

11 A. Yes.

12 Q. And let me just read the email.

13 It says, "Hi, Dave."

14 THE COURT: Mr. Smith, I can see my court reporter is
15 struggling.

16 MR. SMITH: I'm sorry.

17 BY MR. SMITH:

18 Q. And my question, Mr. Li, is -- I am going to show you this,
19 what is the second paragraph here.

20 And, just for the record, it reads, "Also, I suggest a
21 different standard size for these. We just copied the ones
22 PayRange did. And that doesn't mean we need to stay to that
23 size. It just needs to fit on the machine. Okay?"

24 Okay -- okay. Now, Mr. Li, did I read that correctly?

25 A. Yes, you did.

1 Q. And so you -- you received an email in 2017 from the
2 employee of KioSoft saying they were going to copy the PayRange
3 stickers; is that correct?

4 A. I received an email from an employee of mine saying, Yes.
5 Again, there is no use to copy of PayRange sticker. You guys
6 have -- again -- sorry. PayRange stickers use theirs for a
7 purpose. He has a QR code, an information machine information.
8 So, therefor, if -- if my applications stand of PayRange
9 sticker, he would do nothing.

10 So, what they are talking about copying is the size.
11 PayRange's size is this much.

12 Yeah, so let's make Wash's, who is an already accepted
13 PayRange, let's copy the size.

14 That is what he was talking, size, not the information in
15 PayRange.

16 Again, PayRange has some marketing information, et cetera.
17 It has no value to us.

18 Q. So, in your view, it was personally okay to copy the size
19 of the PayRange sticker?

20 There no problem with that, at KioSoft, right?

21 A. I didn't think that it was patented, the sizes of the
22 PayRange sticker. So, I think it is fine.

23 Q. So, your testimony is it is okay to copy the PayRange
24 sticker, but it is not okay to copy the PayRange app; is that
25 right?

1 A. Again, what part of PayRange app are you talking about?

2 Q. What are we talking about?

3 Well, my question is just -- based on your testimony, it
4 was okay for KioSoft to copy some things. That wasn't against
5 the company policy. But, you are saying there was some sort of
6 line where, yes, you can copy the sticker, you can copy other
7 stuff from PayRange, but Oh, no, not the app. We can't copy
8 that.

9 Is that what you are saying?

10 A. If you look at -- okay, I went to university. I have a
11 whole bunch of posters up on the wall. I think they are pretty
12 much the same size, all right?

13 If somebody -- who copied whose poster?

14 How can you compare that to copying software and
15 technology?

16 It is -- you are not comparing apples to apples here.

17 Q. Now, you would agree, you never reprimand- -- strike that.

18 You never reprimanded the employees at KioSoft to copy the
19 PayRange sticker, right?

20 MR. ROBERTSON: Objection, your Honor. Relevance.

21 THE COURT: Sustained.

22 MR. SMITH: I will move on.

23 BY MR. SMITH:

24 Q. What about the shape of the sticker?

25 Did you also copy that?

1 MR. ROBERTSON: Your Honor, relevance.

2 THE COURT: Overruled.

3 You can answer.

4 THE WITNESS: They are all square. So, I -- probably,
5 ours was -- probably, I don't know of any stickers on any
6 company's that is not -- other than square.

7 So, I think ours is square-ish.

8 BY MR. SMITH:

9 Q. Is that a yes or no?

10 THE COURT: It is a "yes," Mr. Smith.

11 BY MR. SMITH:

12 Q. And Mr. Li, has -- strike that.

13 I believe in your testimony you mentioned that you
14 understood that originally, PayRange was in the vending space.
15 Is that right?

16 A. That's correct.

17 Q. And isn't it correct that KioSoft has now moved into the
18 vending space, too?

19 MR. ROBERTSON: Your Honor, objection to the relevance
20 of this. The Rule 11 motion is what was in plaintiff's mind
21 when they made the allegation and asserts claims of willful
22 infringement.

23 The vending machine discussion, what -- what was in his
24 business, separate from what we made on direct, is not
25 relevant, and it is not intended to prove whether or not

1 allegations are true.

2 THE COURT: Thank you, Mr. Robertson. I hear you.

3 The objection is relevance, and if I want argument, I
4 will ask for it.

5 Where are you headed, Mr. Smith?

6 MR. SMITH: Well, I was just -- they mentioned the
7 vending space, and I think they were trying to forge a
8 distinction between what PayRange was originally doing and what
9 KioSoft was doing.

10 And, I am just following up on that because I think it
11 is -- it has changed.

12 THE COURT: Okay.

13 You can answer the question.

14 THE WITNESS: Yes. In Canada, we also have products
15 for the vending space now.

16 BY MR. SMITH:

17 Q. Is a different app being provided in Canada?

18 A. Yes. It is a different app.

19 Q. So, if I -- if I had an app, a KioSoft app that I
20 downloaded in the U.S., is it your testimony you would not
21 bring it to Canada?

22 A. There is no vending app in the U.S.

23 Q. But, if I -- if I used -- my question was if I downloaded
24 the KioSoft CleanPay mobile app, I could use that app with the
25 vending machine in Canada, right?

1 MR. ROBERTSON: Objection, relevance, your Honor.

2 THE COURT: Mr. Smith --

3 MR. SMITH: Your Honor, I think that I've reached the
4 end.

5 So, I will just withdraw the question.

6 THE COURT: That was your last question?

7 MR. SMITH: Yes, thank you, your Honor.

8 THE COURT: Ms. Banta?

9 MS. BANTA: I don't have anything else, your Honor.

10 THE COURT: Mr. Li, I appreciate your testimony here
11 today in person.

12 I am going to ask you to take the microphone cover with
13 you. That is your souvenir for appearing.

14 Ms. Banta, do you have another witness?

15 MS. BANTA: No, your Honor.

16 THE COURT: Okay. Then for planning purposes, is there
17 more to the evidentiary presentation?

18 MS. BANTA: Yes, in a few words, your Honor.

19 THE COURT: Okay. It would be my inclination to check
20 with my court reporter and see if she wants a break.

21 THE COURT REPORTER: Yes, please.

22 THE COURT: Let's take ten minutes, and we will be
23 back.

24 Is it your intention to -- just to advance the
25 exhibits, and the objections have already been exchanged?

1 MS. BANTA: Yes, your Honor.

2 THE COURT: Okay. So, we will complete the plaintiff's
3 presentation after about a ten-minute break. Okay?

4 MS. BANTA: Yes, your Honor.

5 MR. SMITH: Yes, your Honor.

6 (Whereupon, there was a recess, after which the
7 following proceedings were had:)

8 THE COURT: Please proceed.

9 MS. BANTA: Your Honor, we would like to move into the
10 discussion of the case law, and the additional evidence with
11 regard to the first basis for Rule 11 sanctions, that is the
12 false factual allegations.

13 THE COURT: One moment. You will have argument, but
14 can we complete the admission of exhibits?

15 MS. BANTA: Yes.

16 THE COURT: And also, for planning purposes, I have to
17 take a change of plea at 11:30, which is a half-hour virtual
18 proceeding. So, if we haven't completed, that just means you
19 will have an early lunch break from 11:30 until noon.

20 But, you will have the opportunity for argument. I
21 just want to make sure you get the exhibits in.

22 MS. BANTA: Your Honor, Defendant's Exhibit 1 is
23 Plaintiff PayRange Inc.'s Responses to Defendants' KioSoft
24 Technologies, LLC and TechTrex, Inc.'s First Set of
25 Interrogatories to Plaintiff.

1 THE COURT: Are there any objections to any of the
2 exhibits that the defense is advancing?

3 MR. SMITH: I don't believe -- as to the rest of the
4 exhibits, I don't think so.

5 THE COURT: Okay. Let me just hear the numbers again.

6 MS. BANTA: Yes. 1, 2, 3, 4, 5, 6 --

7 THE COURT: Hold it up, real quick. Let me make sure I
8 know what 5 is.

9 Okay.

10 Is this a presentation?

11 MS. BANTA: Yes, your Honor. It is a Power Point
12 presentation.

13 THE COURT: Okay. Six?

14 MS. BANTA: Yes, your Honor.

15 THE COURT: Okay.

16 MS. BANTA: Exhibit 10?

17 That is all, your Honor.

18 THE COURT: Okay.

19 MS. BANTA: That have not already been admitted.

20 THE COURT: Okay. Let me read it back. 1, 2, 3, 4, 5,
21 6, and ten; is that correct?

22 MS. BANTA: Yes, your Honor.

23 THE COURT: Okay. Mr. Smith, you have no objection to
24 those?

25 MR. SMITH: Let me see. One, no objection.

1 Two, no objection, subject to we -- we have some
2 additional designations for Mr. Patel -- from Dr. Patel's
3 deposition transcript. So, that is the only additional
4 designation.

5 We don't object to that.

6 I would say, on number four, Exhibit No. 4, I believe
7 the clerk then made a determination -- this Court made a
8 determination that it was not subject to privilege, but we
9 still maintain that it was privileged, Exhibit 4, and
10 inadvertently produced. So, we maintain an objection.

11 Exhibit -- Exhibit 5, I would say lack of foundation.

12 THE COURT: Well, no foundation is being offered for
13 any of these.

14 Okay.

15 THE COURT: So, understanding that, that's not without
16 prejudice to you, asserting that objection. It is just that I
17 think it was both Ms. Banta's and my understanding was there
18 was no objection to these exhibits, unless they didn't seek to
19 add these through a witness or lay a foundation.

20 So, does anyone want to proffer for me what this
21 document is, and what I should understand from it?

22 Ms. Banta, what are you offering it for?

23 MR. ROBERTSON: Yes -- yes, your Honor. The third
24 possibility, for limited purpose, this document is proffered to
25 demonstrate the improper purpose to harass KioSoft and impugn

1 its integrity.

2 THE COURT: Okay. Where do I find that?

3 MR. ROBERTSON: That particular part is internally
4 marked 13. It is entitled "timeline."

5 In that document that was previously produced during
6 discovery, it discusses the motives for filing the lawsuit,
7 about just neutralizing the competition.

8 THE COURT: Okay. Okay. And as to the foundational
9 objection, you want to --

10 MR. ROBERTSON: Yes, your Honor. If we need to, we can
11 also introduce, as plaintiff's counsel mentioned, parts of
12 Mr. Patel's deposition. As you know, on the front page, below
13 Defendants' Exhibit 5, it has Exhibits D0043. This was
14 introduced during Mr. Patel's deposition where he identified it
15 and discussed it, to lay the foundation for it.

16 THE COURT: Mr. Smith, do you want to flesh out the
17 foundational concern?

18 MR. SMITH: I guess. So, the version I have -- at
19 least Exhibit 5 -- does not have a deposition exhibit stamp.
20 So, I don't think I connected the dot that this was something
21 that was in a deposition. So, if there is corresponding
22 deposition testimony that references this particular document,
23 then -- then I think it is -- then I would withdraw the --
24 well, actually, I think the issue is, so Exhibit 5, I don't see
25 any stamp on it.

1 Exhibit 6, there is.

2 So, I don't have a problem with that, I think, as long
3 as the deposition testimony is -- looks like we are entering
4 some of that. So I don't have a problem with the exhibit
5 number.

6 THE COURT: Mr. Smith, I am not following. But, if you
7 object, what do you object to, and why?

8 MR. SMITH: The issue is there are two separate --
9 first of all, there are two separate documents that appear to
10 be marked as Exhibit 5. There is one document that starts --
11 that says "natively produced PR 0103765."

12 Then, there is a blue sheet. And, after the blue
13 sheet, there is another -- another document, and this document
14 looks like it is a different document.

15 And so I guess I'm confused as to whether he is asking
16 about entering this one -- this, this document, or -- or the
17 entire -- entire document.

18 THE COURT: I will go out on a limb here and say
19 Exhibit 5 is the full update, and then 5A is the one page they
20 wanted to draw my attention to.

21 MS. BANTA: That's correct, your Honor.

22 MR. SMITH: Well, again, I am not sure if this was --
23 if this was referenced in the deposition of Dr. Patel, then we
24 don't have a foundational objection.

25 But, I have a -- failed to see that. That is the only

1 objection I would raise now.

2 THE COURT: Okay. So, the foundational objections are
3 meaningful to me in an evidentiary hearing if, for example,
4 further foundation would be necessary for me to understand the
5 document, what it purports to be, and what it purports to say.
6 This was presented to plaintiff's board, as it seems to suggest
7 on its face.

8 MR. SMITH: Well, I don't know that as true.

9 THE COURT: When was the first time you saw the
10 defendants' exhibits that they intended to advance in this
11 hearing?

12 MR. SMITH: We did see them, pretty much at close to
13 midnight -- I guess I didn't see them until Sunday morning.

14 THE COURT: These were produced by your client?

15 MR. SMITH: They were. These were produced. The issue
16 is they were -- these were produced as attachments to emails.
17 And, I understand that some of these documents, the updates to
18 the board, there were a whole series of drafts, and they are
19 attached to emails. And then -- so, the final product was
20 presented to the board. If this is, indeed, the final version
21 that was sent to the board, I have no problem with it. But, I
22 was just somewhat concerned it might be one of the drafts that
23 was --

24 THE COURT: That was drafted by whom?

25 MR. SMITH: Well, there were drafts that they are

1 going back and forth between different people in the company,
2 and then eventually, the CEO would present it. But, it may not
3 have been something that he had even looked at, at this point,
4 I'm sure.

5 THE COURT: Okay. I understand what the advantages --
6 about the argument. I will admit it. I am the factfinder, I
7 considered it, and I understand your argument that it might not
8 reflect the final word of the plaintiff's board or CEO, but it
9 was prepared by somebody within plaintiff's organization.

10 (Exhibits 1, 2, 3, 4, 5, 6, 10, were received in
11 evidence.)

12 MR. SMITH: Yes.

13 THE COURT: Are there any other objections?

14 MR. SMITH: I think the only other one was -- no, I
15 think other than that, that's it.

16 THE COURT: Okay.

17 Then let me ask you this.

18 That completes the evidentiary presentation?

19 MS. BANTA: Yes.

20 MR. SMITH: Yes, your Honor.

21 THE COURT: So, I anticipate that you want more than
22 ten minutes of oral argument?

23 MS. BANTA: Yes.

24 THE COURT: Can I suggest that we break now. I will do
25 the change of plea, and I will have you come back at five after

1 12. It's an early lunch. The Constitution Cafe across the
2 street is open, as are a number of other small cafes around the
3 area. So, you can eat something and be back at 12:05, and then
4 you won't be interrupted for your closings. Okay?

5 MS. BANTA: Thank you, your Honor.

6 MR. SMITH: Thank you, your Honor.

7 THE COURT: Okay.

8 (Break for lunch at 11:20 a.m., after which the
9 proceedings resumed at 12:12 p.m.)

10 THE COURTROOM DEPUTY: Recalling case number 20-20970,
11 civil, Judge Smith, PayRange, Inc., versus KioSoft
12 Technologies, LLC, et al.

13 Appearances are as previously noted.

14 THE COURT: Okay. Ms. Banta?

15 MS. BANTA: Thank you, your Honor.

16 With regard to the first basis for Rule 11 sanctions
17 concerning plaintiff's false factual allegations, within the
18 complaint filed by plaintiff on March 3, 2020, at paragraph 22,
19 there is a statement that on or about February 12, 2019, senior
20 executives of PayRange and defendants had business meetings in
21 Portland, Oregon, during which the parties discussed a
22 potential business and licensing relationship.

23 On information and belief, the defendants have had
24 knowledge of PayRange, the patents-in-suit, and PayRange's
25 products embodying the inventions claimed in the

1 patents-in-suit, at least since February 12 of 2019.

2 As adduced from the testimony of Charles Li today and
3 his previous testimony given in the case, in the deposition,
4 that is not true. Licensing was never discussed. The
5 patents-in-suit were never discussed.

6 With regard to Paragraph 25 of the complaint, it
7 states, "Defendants' infringement has been and is willful and,
8 pursuant to 35 U.S.C. Section 284, PayRange is entitled to
9 treble damages."

10 Defendants' willful infringement is based at least on
11 its knowledge of PayRange, its products, and its patents.

12 Defendants have either willfully and or wantonly
13 infringed the patents-in-suit mor have recklessly avoided
14 knowledge of their own infringement.

15 Note that the statement in paragraph 25 was not made on
16 information and belief.

17 Further, in paragraphs 35 and 49, each having identical
18 texts except for the patents to which they referenced, it is
19 stated again, not on information and belief, but as a stated
20 fact that "The defendants and plaintiff had a business meeting
21 in early 2019 where the patented technology was discussed.
22 Despite such knowledge, defendants actively induced its
23 business partners and/or customers to infringe on plaintiff's
24 296 patent."

25 Again, the paragraph 49 which references the 994.

1 As adduced by Mr. Li and as, in fact, confirmed by
2 plaintiff in its own pleading, no information was provided by
3 PayRange to the defendants concerning the patents-in-suit prior
4 to the filing of the lawsuit on March 3, 2020.

5 Referring to Exhibit 1, Plaintiff's Supplemental
6 Answers to Defendants' First Interrogatories, plaintiff
7 admitted the plaintiff did not provide actual notice to
8 defendants of the patents-in-suit prior to filing the
9 complaint.

10 You will note in the first supplemental response, the
11 statement, Actual notice was made through the filing of the
12 complaint in the above-entitled action; regarding constructive
13 notice, PayRange maintains that there has been no showing in
14 this case that it has violated 35 U.S.C. Section 287.

15 However, it has not marked its products with the
16 patents in suit. PayRange reserves its rights to supplement
17 and/or amend this response.

18 Plaintiff further admitted that it did not mark any of
19 its products, with the same answer.

20 In direct contravention of plaintiff's willful
21 infringement claim, plaintiff's CEO, Paresh Patel -- again, the
22 gentleman adduced -- indicated by Mr. Li during his testimony
23 here today, to be one of the gentlemen with whom he met on that
24 February 12, 2019 meeting.

25 Mr. Patel signed the verification of these supplemental

1 interrogatory responses verifying that the plaintiff did not
2 provide actual or constructive notice prior to filing the
3 complaint.

4 In addition, in Exhibit 2, the deposition testimony of
5 Paresh Patel, the following exchange occurred.

6 "Okay. Did you actually talk about licensing
7 technology in that February 12, 2019 meeting?"

8 Again, this is plaintiff's CEO Paresh Patel speaking at
9 his deposition.

10 "A. We didn't get into any kind of business terms or
11 anything like that.

12 "Q. Even the framework of a license, you didn't
13 discuss?

14 "A. Yeah. What I discussed right now was the
15 framework of what we were talking about.

16 "Q. Okay. When you met with Mr. Li and Mr. Houser on
17 February 12, 2019, did you have an opinion of whether KioSoft
18 was infringing on any of PayRange's patents?

19 "A. We did believe they were infringing.

20 "Q. Did you ever mention that?

21 "A. I don't remember mentioning it directly to them."

22 Plaintiff has included untrue and unsupported
23 allegations in a pleading by -- and claims that because they
24 have asserted them on information and belief, that somehow,
25 that insulates these statements from their falsity.

1 Noting that paragraphs 25, 35, and 49 do not contain
2 the prefix or preparatory text, "on information and belief,"
3 argument is in a posit as to those allegations, at least.

4 Plaintiff went on to admit, in fact, a second time,
5 however, that it lacked any information to dispute defendants'
6 statement that defendants first received notice of the
7 patents-in-suit when plaintiff filed its complaint.

8 I will refer to Exhibit 12, defendants' Submitted
9 Answer Affirmative Defenses and Counterclaim, and specifically,
10 paragraph 63 therein, which states that the complaint was the
11 first notice that KioSoft or TechTrex had concerning PayRange's
12 296 and 994 patents, which plaintiff responded, in Exhibit 13,
13 plaintiff's amended answer to counterclaim, "Plaintiff lacks
14 knowledge or information sufficient to form a belief about the
15 truth of the allegations contained in paragraph 63.

16 So, did plaintiff have proper information and belief at
17 the time that it filed its complaint on March 3rd, when a
18 filing much later in the case indicated that they had no such
19 knowledge, no such information?

20 Remember, it is important to note, as well, that
21 plaintiff attempts to draw a distinction between notice and
22 knowledge.

23 But, as adduced by the testimony provided by Mr. Li
24 today, there is no difference. Whether you call it notice, and
25 in that term, we mean actual knowledge, as well as notice under

1 Section 287, defendants had neither. Plaintiff's allegation
2 that the patented technology was discussed in 35 and 49 -- that
3 is complaint paragraphs 35 and 49 -- contradicts plaintiff's
4 CEO's verified answer to Interrogatory No. 1, that plaintiff
5 failed to mention the patents-in-suit to defendants, to
6 advertise to anyone that those patents existed until plaintiff
7 filed its complaint.

8 Doubling down on this false statement, plaintiff now
9 suggests the alleged inclusion of the word "patents" on the
10 plaintiff's website put the defendants on notice.

11 But, again, mere reference to patents without
12 identifying them by number does not provide the information
13 sufficient to merit a willful infringement claim under 35
14 U.S.C. Section 287, which requires specific mention of the
15 actual patent numbers alleged to be infringed.

16 And, they can do it, again, three ways: They can tell
17 us about it, whether in writing or orally; they can put it on
18 their website and publish it electronically, or they can
19 actually mark their product.

20 And, I checked this very morning, plaintiff's website
21 still does not show the patents-in-suit listed as ones that
22 cover plaintiff's products.

23 Plaintiff's allegation that the defendants have had
24 knowledge of PayRange, the patents-in-suit, and PayRange's
25 products at least since February 12, 2019, when it is not a "he

1 said, he said," question.

2 We have the admission of the plaintiff's CEO, Paresh
3 Patel and KioSoft and TechTrex's president, Mr. Charles Li,
4 both confirming in their testimony here and in previous
5 depositions that no knowledge was imparted by one to the other
6 concerning the patents-in-suit.

7 In fact, this claim that we should have known or did
8 know, as of February 12th, 2019, about these patents-in-suit
9 remains inconsistent with the emails exchanged between the
10 parties following that meeting.

11 The March 18, 2019, email, Exhibit 14, indicates that
12 PayRange considered the technologies to be complementary.

13 There was never a statement made by PayRange to a
14 KioSoft person indicating that there was a problem.

15 One would think that if one was so sure, as of
16 February 12, 2019, that infringement was occurring, and the
17 email of Exhibit 15 occurs, to say, "I want to buy you, and you
18 said no," that someone would have thought to say, "Well, you
19 can't keep doing what you are doing, because we own these
20 patents and you have got to stop," and brought them back to the
21 negotiating table for this sale, or this investment. They
22 never did that.

23 They never told the defendants a thing. And that is
24 the falsity here. Defendants have pled knowledge, according to
25 the complaint -- again, it says, "Defendants have had knowledge

1 of the patents-in-suit at least since February 12th, 2019, and
2 contradicted by plaintiff's admission that it did not actually
3 or constructively notify the defendants of the patents-in-suit
4 until filing the complaint, and there is no testimony from
5 anyone other than the statement that counsel made, not under
6 oath today, that he had spoken to someone at Wash who indicated
7 that our client did have knowledge.

8 I will note, plaintiff sent a subpoena duces tecum and
9 a subpoena ad testificandum to Wash Multi-Family Laundry
10 Systems. No deposition was taken as a result of that. No
11 affidavit was obtained from Wash. No affidavit was obtained
12 from the gentleman that the plaintiff's counsel indicated he
13 spoke with concerning this matter, and I know that he didn't
14 indicate what time he made conversation, or had that
15 conversation, whether it was before or after the filing of the
16 complaint.

17 There is no evidence in this case that that knowledge,
18 in fact, occurred. There is a hearsay statement by plaintiff's
19 CEO in his deposition indicating that he believed that somebody
20 at Wash told him that KioSoft might have known about the
21 patents. But, there is no proof. There is that hearsay
22 statement.

23 Dr. Patel could not recall who made that statement.
24 There simply is no evidence. And, plaintiff did not allege
25 that Wash had this bombshell information in its complaint.

1 On or about February 12, 2019, senior executives from
2 PayRange and defendants discussed a potential business and
3 quote unquote licensing relationship.

4 So, it's contradicted by plaintiff's CEO Patel's
5 testimony that they did not discuss licensing.

6 On information and belief, the defendants have had
7 knowledge of the patents-in-suit since before this lawsuit.
8 This is contradicted by plaintiff's answer admitting that it
9 lacks knowledge or information sufficient to form a belief
10 about defendants' statement that the lawsuit was the first
11 notice that the defendant had about these patents-in-suit.

12 Plaintiff's claim for willful infringement presented in
13 its complaint without any reasonable factual basis, therefor,
14 is alone sanctionable under Rule 11, and your Honor does not
15 need to reach any of the points; however, we believe that the
16 other points are, in fact, met, and we will address those now.

17 Concerning the second basis for Rule 11 sanctions,
18 claims of frivolous legal claim, plaintiff admittedly cannot
19 establish the necessary element of defendants' knowledge of
20 plaintiff's infringement theories because plaintiff failed to
21 provide actual or constructive notice of the patents-in-suit,
22 and plaintiff's unpled, post-filing willful blindness theory is
23 not supported by the facts.

24 This Court has ruled that to willfully infringe a
25 patent, the alleged infringer must know of the patent.

1 Plaintiff concedes it lacked any information to support
2 its willful infringement theory as part of the complaint prior
3 to and at the time of filing its complaint.

4 This confession alone supports an imposition of
5 sanctions.

6 Plaintiff now attempts, post complaint, to support its
7 willful infringement claim based on frivolous, unpled, and
8 baseless legal theories. Defendants' alleged willful blindness
9 and defendants' post-suit knowledge of the patents-in-suit.

10 However, in order to bring a willful infringement
11 claim, plaintiff would have had to have pled in its complaint
12 that defendant subjectively believed that there was a high
13 probability that a fact exists such at existence of the
14 patents-in-suit and then took deliberate actions to avoid
15 learning that fact. Plaintiff had no evidence to support that
16 theory. That's why they didn't plead it in their complaint,
17 and there is certainly no post-suit information that would
18 support that pleading either.

19 Plaintiff, therefore, did not allege any of these
20 elements in the complaint, and plaintiff now asks the Court,
21 more than a year after the complaint was filed, to make a
22 logical leap from allegations concerning business and licensing
23 relationship discussions -- again, you recall that no licensing
24 was discussed -- and discussions about the patented technology
25 -- you recall there was no discussion of patents, simply

1 technology -- or proprietary technology, that was also not
2 discussed -- just to establish a pleading of willful blindness.
3 This Court has already found such barebones allegations do not
4 support the willful infringement claim.

5 More than a year after filing the complaint, telling us
6 -- again, points to evidence not relevant to the
7 patents-in-suit to suggest that defendant should have divined
8 them.

9 We have already been through the sticker discussion. I
10 don't need to say any more about that, other than the patent --
11 stickers aren't patented. They don't bear any marks -- the
12 stickers at issue did not bear any marks of patents.

13 There was no indication of proprietary technology or
14 anything, and a square sticker versus any other shape is not
15 protectable under any style or theory of intellectual property
16 unless it is extremely ornate -- under any type of intellectual
17 property protection, including copyright.

18 Additionally, to the extent that plaintiff asserts that
19 there was some sort of copying that occurred that they believe
20 was actionable, then why isn't there a copyright infringement
21 claim in this case?

22 It's because the only thing that was similar was the
23 size and shape of the sticker used to cover up the PayRange
24 sticker when our client took its business.

25 Plaintiff suggests that defendants' typing of emails

1 using the domain payrange.com put defendants on notice of the
2 patents-in-suit. However, the exhibit proposed by plaintiff
3 for this is unauthenticated; it wasn't produced in discovery,
4 and it doesn't say anything. The website, again, does not say
5 anything about patents other than it provides a different
6 patent. It is the 0-4-5 pattern -- sorry I don't have the
7 entire number -- and, it also says, "patents issued and
8 pending."

9 That does not put anyone on notice of patents-in-suit.
10 And, it does not, according to our research, impose a duty on
11 anyone to go searching for unlisted patents. We were unable to
12 find any case indicating that a duty to search for unlisted
13 patents exists.

14 And that is, in fact, why Section 287 was drafted by
15 Congress, because it wanted to make sure that of the more than
16 11 million patents out there, the patentee -- who has the most
17 to gain by informing the universe of its patent rights -- is
18 given -- the onus of advertising those rights is on that
19 patentee.

20 Plaintiff further contends that there is an email
21 discussing plaintiff's promotion; sales specials, ten percent
22 off if you do this within a certain period of time, and that
23 that put defendants on notice of the patents-in-suit.

24 Their sales emails -- those emails had no references to
25 patents in them; no references to proprietary technology --

1 again, no reason for our client to do anything and, certainly,
2 nothing that it would have known about that it was putting its
3 head in the sand.

4 Certainly, it was not.

5 Plaintiff also cites to a nonbinding case from the
6 Eastern District of Texas to suggest the defendants were
7 wilfully blind to the patents-in-suit because the defendants
8 allegedly instructed their employees not to review the patents
9 of others based on a statement in the defendants' president's
10 deposition. Again, the testimony adduced there in Exhibit 3:

11 "Q. Aside from this lawsuit, has TechTrex or KioSoft
12 ever been accused of patent infringement?

13 "A. No.

14 "Q. Does KioSoft or TechTrex have any written policy
15 regarding the avoidance of IP infringement at the company?

16 "A. No."

17 And, in my experience as a patent attorney, I would say
18 that 99 percent of the companies in the United States today do
19 not have a policy on patent. It's a rare thing. It is just
20 not something that most people think about. As Charles --
21 sorry, as Mr. Li adduced in his testimony, he indicated they
22 were growing; they were working very hard to build a business;
23 everyone was excited.

24 No one is looking behind them and calling lawyers when
25 they don't see anything wrong, and nobody is telling them that

1 anything looks amiss.

2 Plaintiff essentially argues that defendants were put
3 on notice of the patents-in-suit because defendants knew that
4 plaintiff existed and knew, generally, of plaintiff's product.

5 Mere awareness of another company's existence and its
6 products fails to satisfy the notice requirements.

7 "Simply because a plaintiff is successful" -- again,
8 there is a question here on that -- "and well-known in the
9 industry does not mean that the defendant has knowledge of the
10 plaintiff's patents."

11 That is the At Most Nation case.

12 And, we have established here there was no knowledge.

13 Plaintiff also cites to a further unpublished and
14 nonbinding opinion from the District of Delaware to advance its
15 proposition that post-suit infringement can support willful
16 infringement claims alleging presuit conduct. However, courts
17 in the 11th Circuit have rejected this view and held that a
18 plaintiff's willful infringement claim, which is based solely
19 on defendants' post-filing conduct, fails as a matter of law.

20 Addressing briefly the Delaware decision cited by
21 plaintiff, in that case, the plaintiff was allowed to continue
22 using or was not required to change the pleading, because in
23 fact, the plaintiff had alleged that since receiving notice of
24 the complaint, the defendant had knowingly infringed each of
25 the patents. So, it is not the same case here where they

1 allege only presuit knowledge. In the case cited by plaintiff,
2 it was about post-suit knowledge, pled in the complaint as
3 such.

4 That is not the case here.

5 So, your Honor, for the second reason, plaintiff's
6 claim for willful infringement as presented, based on a theory
7 that has no reasonable chance of success, itself, separate and
8 apart from the other two reasons, is sanctionable behavior.

9 So then, we reach the third basis for Rule 11
10 sanctions, and that is plaintiff's improper purpose.
11 Plaintiff's claim of willful infringement violates Rule 11
12 because plaintiff included it in plaintiff's complaint in order
13 to harass defendants, to impugn their integrity in the
14 industry, and to spread that message as far and wide as
15 possible.

16 Before this complaint was ever filed, plaintiff's
17 counsel had a pitch meeting with plaintiff, PayRange, in which
18 the first page contained an executive summary with a bullet
19 point that reads, "We also recommend educating prospective
20 customers about the case to dissuade them from working with
21 KioSoft."

22 Now, in my experience, when I am providing a pitch to
23 potential litigation clients, I am going to talk about facts
24 and what I am going to do to argue them best to the Court.

25 And, in this case, it is all about kneecapping the

1 competition. This is a business tactic.

2 The evidence also shows that plaintiff intended to use
3 this lawsuit to neutralize the competition from defendants and
4 kill defendants' business.

5 Exhibit 5, the PayRange first quarter '20 board update
6 contains the text "neutralize the competition. Align with
7 competition with strategic partnerships or kill them. ESD
8 Global lawsuit, et cetera."

9 The evidence also shows plaintiff intends to use this
10 lawsuit as leverage in negotiations with customers that were
11 shared by both PayRange and defendants.

12 In Exhibit 6, there is an email exchange with the C
13 Suite Executives of PayRange, talking about Wash Multifamily
14 Laundry Systems. Mr. Li spoke earlier about the fact that he
15 also counts Wash among his customers, as does PayRange.

16 Michael Kitchens, with PayRange, writes to Dr. Patel,
17 "The single, most powerful tool we will have to negotiate with
18 is the IP lawsuit. This could stop KioSoft in its tracks."

19 Dr. Patel responds, "And lawsuit. That will be a
20 kneecap on their negotiation power."

21 Following the filing of the lawsuit, Exhibits 7 and 8
22 established that plaintiff, through plaintiff's counsel, sought
23 to intimidate the largest route operators, that is laundry
24 machine owners in the United States, who are customers of the
25 defendants, CSE, Service Works, and Wash Multifamily Laundry

1 Systems by sending them threatening letters containing
2 allegations of willful conduct which, again, the facts show
3 they did not have any information to support at the time that
4 they were made.

5 They have hidden behind litigation privilege saying,
6 "Oh, it is in the complaint."

7 If it is not true, it can't be.

8 Plaintiff also heavily circulated its baseless press
9 releases to discourage current and prospective customers from
10 doing business with defendants.

11 Exhibit 9, Defendants', attached to the original motion
12 and then also discussed today, indicates that plaintiff's
13 counsel filed allegations stating that "KioSoft blatantly
14 disregarded PayRange's patent rights."

15 Plaintiff had no basis on which to make that statement
16 because they knew they had never been discussed, and they had
17 never provided anything to anyone for anyone to even know to
18 look for them.

19 Plaintiff has disseminated this baseless accusation
20 broadly in over 413 online placements accessible to over 39
21 million readers.

22 Exhibit 10 -- this was discussed by Mr. Li during his
23 testimony today -- he can't get away from that. Every time he
24 goes to talk to a customer, that is the first thing they want
25 to talk about. He can't pitch to them until he assures them

1 that the claims are baseless, as proven -- as will be proven in
2 our motions for summary judgment that are pending.

3 Plaintiff's claim for willful infringement was made in
4 its complaint for the improper purpose of killing defendants'
5 business, kneecapping KioSoft's negotiating power with Wash
6 Multifamily Laundry Systems, and dissuading customers from
7 working with KioSoft. Making such an allegation for such a
8 purpose is separately punishable under Rule 11.

9 Plaintiff seeks treble damages and attorney fees under
10 its willful infringement claim. And, in addition to defending
11 against these monetary claims, defendants seek relief from the
12 reputational harm caused by plaintiff's baseless and frivolous
13 claims for willful infringement.

14 With regard to the timing of the motion to dismiss, the
15 alleged need to file a motion to dismiss and more definite
16 statement for these counts, it is certainly within defendants'
17 purview and cautious nature to see whether our -- counsel will
18 see whether our clients are telling the truth by going through
19 discovery and seeing whether anyone could identify a shred of
20 evidence that could have supported those allegations.

21 We found none. We filed as soon as we figured that
22 out.

23 There was no harm or prejudice caused by such a delay
24 when Rule 11, itself, provides for the 21-day period in which
25 plaintiff could have withdrawn those and thrown up its hands

1 and said, "We agree. We have been through discovery. There
2 isn't anything here. We're sorry, but we have made a mistake."

3 But, they haven't done that. And, instead, they have
4 pulled everyone down to the Southern District of Florida, a
5 client from Toronto, Canada, one lawyer from Washington DC,
6 another lawyer from California, and another lawyer from
7 Indianapolis. The expense doesn't make sense in view of the
8 falsities here.

9 Because plaintiff has repeatedly refused to amend its
10 complaint and is now pressing new legal theories, defendants
11 respectfully request the Court impose sanctions on the
12 plaintiff and plaintiff's counsel, including and not limited to
13 an award to defendants' reasonable attorneys' fees and
14 expenses.

15 Thank you, your Honor.

16 THE COURT: Ms. Banta, I have a couple of questions.

17 MS. BANTA: Yes, your Honor.

18 THE COURT: I noticed that -- and the motions aren't
19 referred to me, so I am not as familiar with your summary
20 judgment motions, but I noticed that as if filed and captioned
21 as a partial motion for summary judgment.

22 What is partial about it?

23 MS. BANTA: Your Honor, we have a counterclaim pending,
24 a pair of them, and we did not file summary judgement on
25 those -- on those counterclaims. What we did file summary

1 judgments on were the infringement claims made by plaintiff,
2 and we also filed summary judgment requests for the invalidity
3 -- to address the invalidity of both the 296 and the 994, which
4 would be our counterclaims concerning that.

5 And also, our counterclaims -- sorry, for the
6 noninfringement.

7 So. We have four counterclaims; two of which -- one
8 concerned unfair competition, and the other was Computer Fraud
9 and Abuse Act claim. We did not file summary judgment on that,
10 although plaintiff did, and we are working against that.

11 THE COURT: Okay. So it is complete with respect to
12 the plaintiff's complaint?

13 MS. BANTA: Yes, your Honor.

14 THE COURT: Okay. If I have any other questions, you
15 will get last word.

16 MS. BANTA: Thank you, your Honor.

17 THE COURT: Mr. Smith.

18 MR. SMITH: Thank you, your Honor.

19 Again, this is not -- all the cases we have heard, I
20 think, almost exclusively from the defendants were -- with
21 regard to willfulness -- pertain to a Rule 12 motions to
22 dismiss, and perhaps maybe there was one on a summary judgment
23 motion.

24 But, we didn't hear anything about where -- cases about
25 Rule 11 motions in connection with willful infringement.

1 And, those are two very different things in terms of
2 moving to dismiss under Rule 12 and moving for Rule 11
3 sanctions.

4 And -- so really, the issue here is, you know, was
5 there -- was there some -- was there a basis to make the
6 allegations contained in the complaint that was filed back in
7 March 2020 based on the reasonable investigation that we
8 undertook in filing the complaint?

9 And, certainly, I think, as we heard from the
10 defendants, the facts that we learned about in our
11 investigation were, in fact, corroborated by the testimony of
12 Dr. Patel, PayRange's CEO.

13 And, it is true that Mr. Li has a different
14 recollection of the meeting. He -- and -- and that's what one
15 would expect. You have two different fact witnesses on
16 different sides of the aisle, and they have different
17 recollections of the facts, and the issue of willful
18 infringement is an issue for the jury.

19 So -- for example, Mr. Patel -- he actually, in two
20 different depositions, he testified that during the meeting
21 with KioSoft, he mentioned that the company did have patented
22 technology.

23 So, Mr. Patel -- Dr. Patel, rather -- he testified to
24 this twice. He said, "We have patented technology."

25 And he said, "We have patented technology."

1 And, he said that is what he told KioSoft.

2 And, as part of our investigation -- I mean, that is
3 consistent with our investigation before filing the lawsuit, is
4 that we understood that at the meeting, Dr. Patel said that the
5 company had patented technology.

6 THE COURT: And, it is your contention, Mr. Smith, that
7 having patented technology is sufficient to put the defendants
8 on notice.

9 Or, to -- I understand that distinction you are drawing
10 between the damages notice and the knowledge necessary for
11 willfulness. But, it is your contention that telling them that
12 "We have patented technology" tells them of the
13 patents-in-suit?

14 MR. SMITH: Well, I would say, to start off with, for
15 knowledge -- and this is discussed in the Supreme Court's Halo
16 v. Pulse case, and that's 136 S. Ct. 1923, 2016.

17 And, in that case, the Supreme Court found that
18 knowledge could be created, it could be actual or it could be
19 willful blindness. Those are two sides of the same coin with
20 respect to knowledge.

21 And so, our contention is that certainly, given all of
22 the factual context, that if you go to a -- if you are going to
23 a meeting with your admitted competitor, and they are saying,
24 "We sell, basically, the same thing you sell, and our system,
25 our product that we are selling to customers is patented."

1 And, that should be enough -- at least for purposes of
2 making the allegation -- that in response to that, it would be
3 reasonable to do some sort of investigation.

4 Instead, what defendants are saying is, "Yes, we -- if
5 we take the allegations as they were in the complaint, that we
6 learned that we had -- there was patented technology from our
7 competitors and we did nothing, we did absolutely nothing in
8 response to that, and continued to sell our own products in
9 competition; did not enter into any sort of arrangement where
10 there would be some sort of authorization -- although I think
11 it is probably true that the licensing discussions didn't get
12 very far, but they were at least discussed at some fairly high
13 level -- that that information is enough to at least give
14 someone the -- to reasonably partake in some type of
15 investigation.

16 The facts are similar to those of the Halo v. Pulse
17 case.

18 So, in that case, the -- the -- well, actually, let me
19 step back, too.

20 In Halo v. Pulse, which changed the law on willfulness,
21 the Supreme Court never even said the knowledge was necessarily
22 a requirement for willful infringement. It said -- and I'll
23 quote -- that Section 284 allows district courts to punish the
24 full range of culpable behavior. Courts should continue to
25 take into account particular circumstances of each case in

1 deciding whether to award damages, and in what amount."

2 And, there were subsequent cases, as well, that
3 interpreted the Halo decision, such as the Huawei T-Mobile
4 case, I think, was mentioned, and that is a case from the
5 Eastern District of Texas where the judge said in that case
6 that nothing in Halo suggests that presuit knowledge is -- is a
7 requirement for willfulness.

8 And, that is also consistent with the Global Tech v.
9 SEB Supreme Court case. And, that was 131 S. Ct. 2060 for
10 2011. In that case, what was interesting was the facts are
11 somewhat similar, in that the accused infringer did not know
12 the patent number. That was undisputed. They did not know the
13 patent number. In fact, they didn't even know for sure -- they
14 didn't know that the product they were looking at was actually
15 patented.

16 But, what they had was enough evidence -- they had
17 enough indications that it would have been reasonable that the
18 patent that they were looking at -- that they were copying --
19 could have -- was patented. And so, the Supreme Court found
20 that they had done enough to put on willful blinders and avoid
21 learning the knowledge.

22 And, the key knowledge there was they avoid learning
23 knowledge to suggest that they were infringing. So, they had
24 indications, for example, to learn that they were basically
25 copying a competitor's product -- and that product did not have

1 a patent marking on it -- but, because of the various
2 circumstances in that case, there is a high probability that
3 the product they were copying was patented.

4 And so, that is really the key thing here, is that --
5 given the facts that KioSoft had, even for purposes of
6 pleading, is it reasonable that they could have known that the
7 product of PayRange was patented?

8 Whether or not they knew what the actual patent number
9 is, is not particularly relevant.

10 And, what we have here is certainly a case -- and we
11 didn't allege in the complaint -- what we didn't say was "You
12 have the patent number. We told you the patent number."

13 There was no statement in the complaint that said that.
14 We said, "On information and belief, based on -- based on the
15 meeting and what we learned from the client and prefiling
16 investigation, there was enough to say they had knowledge."

17 And, knowledge can be either actual or it can be
18 willful blindness.

19 And, I think the testimony from Mr. Li substantiates
20 the willful -- that there was some reason to believe it could
21 be willful blindness. They basically are saying they had
22 information that PayRange may have had a patent, and they
23 literally did nothing in response that.

24 I would also point out that on the legal side of it,
25 what we never saw was a single case that linked the requirement

1 of notice, under 35 U.S.C. 287, that linked that as an element
2 of willful infringement.

3 The Supreme Court's seminal case, Halo, doesn't mention
4 35 U.S.C. 287. It doesn't say it was a requirement of willful
5 infringement. And, in fact, it doesn't actually even say
6 necessarily what knowledge is a requirement. It is a flexible
7 standard.

8 So, what we have is willfulness isn't a cause of
9 action, separate and apart. It is basically an allegation and
10 request for -- under Section 35 U.S.C. 284, for the potential
11 for enhanced damages.

12 And, that can also be -- there is also nothing that
13 precludes post trial or post lawsuit conduct for the basis for
14 willful infringement. And, I think what we have seen is -- we
15 have seen there is evidence -- there is at least some evidence
16 here that may be disputed about what exactly was copied, but
17 there is some evidence that KioSoft was copying things that
18 PayRange had, things related to their products. And then
19 again, that goes into the willful blindness.

20 So now, it's you're learning that your competitor has a
21 product that is patented. You are looking at the, say,
22 promotional materials. You are copying some of the things they
23 have associated with your mobile app. It actually works with
24 your mobile app. The sticker is used to initiate the mobile
25 app. They are copying those things, and again, all those bread

1 crumbs, and they still did nothing. They never investigate
2 what happened. And that is really what the heart of willful
3 blindness is. You are getting a lot of information that could
4 be a problem here, and whether it would be reasonable to do
5 some sort of checking, because if you did, then you would have
6 learned about the patent.

7 So, you can't shield yourself from the knowledge to
8 avoid potential liability. That's really what the willful
9 blindness issue is about.

10 So, at the end of the day, the statements we are
11 talking about were -- were basically an information and belief
12 statement that there was knowledge. And, it could have been
13 actual, indirect, and it is based on investigation that was
14 verified through the discovery process, through Dr. Patel's
15 testimony. And, of course, we couldn't investigate reasonably,
16 we couldn't have interviewed Charles Li or other individuals
17 who actually worked at KioSoft to get their side of the story.

18 And then furthermore, it is worth noting that we have
19 the statement from Paresh Patel, as well, that he heard from --
20 from Wash -- which both sides admit was a common customer -- he
21 heard -- they told him that KioSoft knew of the PayRange
22 patents. That is another indication that KioSoft knew about
23 it.

24 So, it is reasonable to assume that, upon information
25 and belief, that they had the knowledge. And, through the

1 discovery process, we can discover and see if there is evidence
2 to support those allegations. And, again, they are moving on,
3 really, just simply what was in the complaint at the time it
4 was filed.

5 And I would also, also point out, too, this is an
6 additional issue, I guess, we should -- on the summary
7 judgment point, it is true they moved for summary judgment on
8 the different counts in the complaint. But, what they didn't
9 do is separately move for summary judgment and say, "We are
10 moving on the issue of willful infringement."

11 They could have. So, in other words, it is an all or
12 nothing thing. Either the Court is going to grant summary
13 judgment and this whole case is out, because there is an
14 underlying element of the patent that they say is missing, that
15 type of perspective. But, what they didn't do is they didn't
16 file a motion for summary judgment and say, "There is no
17 evidence of willful infringement."

18 So, even if infringement goes to the jury, the jury
19 shouldn't get the willfulness. They didn't do that. That is,
20 again, just a point of -- they are trying to basically use
21 Rule 11 as a surrogate for having gone through summary
22 judgment.

23 So, also, I would point out that there was a point made
24 about well, this is brought for an improper purpose.

25 This -- this echoes, really, one of the counterclaims

1 that KioSoft brought. They brought a defamation counterclaim.
2 We moved to dismiss. Judge Smith granted our motion to
3 dismiss. And, in doing that -- and this is at docket entry 43,
4 pages 3 and 4, he wrote that the heart of this defamation
5 claim -- well, the letters that we -- that I sent to Wash and
6 CFC were -- were improper and defamed KioSoft, and he found
7 that they were -- they "Relate to judicial proceedings, and are
8 protected," and dismissed the counterclaim based on litigation
9 privilege.

10 And so -- again, all -- all of the communications that
11 PayRange has ever disseminated about this are simply restating
12 the allegations made in the complaint. Anybody can get the
13 complaint. It is public. And that's what the litigation
14 privilege protects.

15 Certainly, we also allege in the complaint we're
16 seeking an injunction against KioSoft's infringement. So, of
17 course, the endgame would be to -- would be to enforce the
18 injunction, and enforce our patent rights. So, the fact that
19 we said things internally about trying to shut down KioSoft, it
20 is consistent with what we pled, and those are also internal,
21 the things they are talking about from PayRange, those were
22 internal communications. Those were not sent to outside, nor
23 telling people outside the company anything really beyond the
24 pleadings.

25 In closing, I will just note that at the end of the

1 day, this is not a determination about whether or not the
2 willful infringement allegations are meritorious in the sense
3 of we are going to win in front of a jury, or they would have
4 survived a summary judgement motion, had one been brought, or
5 had survived a motion to dismiss, had that been brought.

6 This is a Rule 11 context. And, I think what KioSoft
7 is trying to do is affirmatively litigate the willfulness
8 issue. But, really, that is a jury issue. And here, we are
9 just talking about whether there is reasonable basis to make
10 really these few discrete statements that were identified in
11 the complaint on information and belief, as to knowledge.

12 And the other statements -- so, there was a statement
13 that said "knowledge on information and belief," and the other
14 statements always said it is either they willfully infringed
15 through either having actual knowledge, or, if they didn't
16 know, through a willful blindness.

17 So, in other words, given everything that they learned,
18 either they knew about the patents or they didn't know about
19 the patents because they have willfully blinded themselves to
20 that knowledge, and that is the legal theory we are advancing.

21 As I said, there are several cases that say knowledge
22 isn't even necessarily required for willful infringement. So,
23 it is not really about what the law correctly is, in this
24 District. It is -- could be advanced, at a minimum, a
25 reasonable extension of other reasonable authority which, I

1 think, based on the allegations we have made, at a minimum,
2 would be a reasonable extension of existing authority.

3 THE COURT: Are you ready for a question?

4 MR. SMITH: I am, your Honor.

5 THE COURT: Okay. The proffer from the defense is that
6 there was no knowledge imparted from one to the other about the
7 patents-in-suit at the February 2019 meeting. Is that
8 disputed?

9 MR. SMITH: It is disputed in that Mr. Patel, Dr.
10 Patel -- in his deposition, and this is consistent with what he
11 told us presuit -- was that he said we -- PayRange -- have
12 patented technology.

13 So, they knew that the PayRange products were protected
14 by two or more patents. That is the sort of knowledge that is
15 being discussed in the Global Tech case. In the Global Tech
16 case, the issue is, rather, there is a risk that the activities
17 are infringing. There is nothing in there about specific
18 patent numbers.

19 So, if you learn a competitor has a patented product,
20 and you are making, basically, the same product that is
21 competing with them, then that, I think, in our view, at least,
22 arguably that would be a risk of infringement because you are
23 making the same product that is protected by a patent.

24 Whether you have to have that actual patent number,
25 there -- that is not -- case law does not indicate that that is

1 an absolute necessity for willful infringement.

2 THE COURT: Do you want to respond to the observation
3 that paragraph 63 of the counterclaim alleges that the
4 complaint was the first notice that KioSoft or TechTrex had
5 concerning the patents, and the plaintiff's answer that they
6 lacked information to answer?

7 MR. SMITH: Well, I think the notice issue is -- and
8 this was the same thing in the interrogatory response -- was,
9 briefly, we did not send them a letter that would constitute
10 notice under 35 U.S.C. 287, because that notice means you give
11 somebody the actual patent number of the accused product, and
12 there has to be sufficient detail in that notice to constitute
13 notice under that statute.

14 And, we do concede that that -- nothing like that was
15 sent to KioSoft.

16 But, again, that is notice.

17 So, we would agree that for that purpose or that
18 statute, the filing of the complaint was the first notice.
19 But, that doesn't mean that they didn't have knowledge from
20 other sources, or as part of that willful blindness.

21 Those are two distinct issues.

22 THE COURT: And it is your contention that
23 paragraph 63, used notice in the manner that you are describing
24 limited to that, which arises out of the damages statute.

25 A. That is my belief.

1 I think that they -- from all of the briefing, it frankly
2 seems that KioSoft was under the same impression, and they have
3 talked about the notice for requirement of 35 U.S.C. 287, in
4 their brief, as well. So, in short, I think that was my
5 understanding. Whenever I hear about notice in patents, it is
6 notice pursuant to that statute, 287.

7 THE COURT: Okay. Those were my only questions for
8 you.

9 MR. SMITH: Okay. Thank you, your Honor.

10 THE COURT: Ms. Banta, you get the last word.

11 MS. BANTA: Thank you.

12 I think what we are seeing here, in the words of a
13 football player, would be a "hail Mary pass."

14 Plaintiff has shifted its claims from, in its
15 complaint, claiming that defendants did not, to then admitting
16 that it didn't have information or belief for this, for that
17 statement, then in their opposition briefs to this motion,
18 indicating that defendants should have known, and then
19 Dr. Patel admitted he didn't mention patents or licensing
20 following that, in his deposition.

21 Remember that the time of filing is important. Why
22 didn't we have any evidence adduced today about what PayRange
23 did or what our client -- there just isn't information about --
24 and no evidence about what plaintiff knew before it filed its
25 complaint. Every single thing that has been proved today is

1 post-suit knowledge.

2 The worst is Dr. Patel could have attended this hearing
3 if it really was a "he said, she said" sort of question, and
4 defended his view of things. Not only did he not show up by
5 Zoom or in person, or ask the Court for a continuance so he
6 could do so, plaintiff's counsel didn't even read into the
7 record his deposition testimony that he claims -- where it says
8 this view that somehow, there was a difference of opinion
9 between the parties concerning what happened at that
10 February 12th, 2019 meeting. There is no evidence that
11 plaintiff had any factual basis to allege what it alleged in
12 its complaint filed on March 3, 2020.

13 THE COURT: Do you dispute plaintiff's proffer
14 regarding the testimony?

15 MS. BANTA: I didn't see anything proffered. I didn't
16 hear any line numbers or page numbers.

17 THE COURT: You want to -- let me do it this way. Do
18 you dispute that Dr. Patel testified that at the meeting, he
19 discussed patented technology?

20 MS. BANTA: I -- what I read into the record is my
21 understanding of what his testimony was.

22 And, I do not understand that to be his testimony.

23 THE COURT: Okay. Do you have a copy of the
24 transcript?

25 MR. ROBERTSON: Your Honor, if I may --

1 THE COURT: Yes.

2 MR. ROBERTSON: There were two depositions that
3 Mr. Patel attended; the first, in his individual capacity, and
4 the second was as a 30(b)(6) designee. The first, in his
5 individual capacity, was on January 8th, and that one, as we
6 adduced today, as my colleague mentioned, he -- when we
7 asked --

8 THE COURT: I read it. Go ahead, Mr. Robertson.

9 MR. ROBERTSON: He specifically said in that first
10 deposition that he didn't mention anything about the
11 infringement, or whatever, in that meeting.

12 Then, the second deposition, January 20, that's what --
13 that's what counsel is referring to.

14 And, in that deposition, he does make a reference to a
15 patent. But, as you will note, he contradicts what he said in
16 the January 8th, wasn't alleged at all in the complaints, and
17 that document -- in this PowerPoint presentation given to
18 Mr. Li has not been identified as previous discovery.

19 THE COURT: Wait. What document?

20 MR. ROBERTSON: Or this -- this -- whatever, to support
21 this contradicted statement in the second deposition, that
22 Mr. Patel gave.

23 MS. BANTA: To the extent that the parties discussed
24 technology and there was a PowerPoint disclosed or exchanged.

25 THE COURT: I didn't even understand that from the

1 proffer. I understood Mr. Smith to say that Dr. Patel
2 testified about patented technology. My question to him was,
3 was that enough?

4 That was as far as the proffer Mr. Smith gave. So I
5 don't know what PowerPoint --

6 MR. ROBERTSON: Sorry.

7 THE COURT: You guys know the testimony better than I
8 do.

9 MR. ROBERTSON: Yes, your Honor. I don't know about
10 the specific language, but it's beyond dispute he mentioned
11 something about a general word of patent being used in the
12 February 12th meeting in that second deposition. We do not
13 dispute that.

14 THE COURT: Do you have -- Mr. Smith -- why don't you
15 read it or display it, one of the two?

16 MS. SMITH: So, I will go through it.

17 In both of the transcripts, it says the same thing.

18 THE COURT: If you would, just illustrate what you are
19 proffering.

20 MR. SMITH: So, it is on -- so this is Plaintiff's
21 Exhibit 9, which is the Patel deposition from January 8, 2021,
22 and Page 2037.

23 "Q. Did you ever mention that?

24 "A. I don't remember mentioning it directly to them."

25 And then 238 says:

1 "Q. Did you mention it indirectly to them?

2 "A. Well, when I was overviewing our technology, I
3 mentioned that our solution was patented."

4 And then, if you go to Plaintiff's Exhibit 8, which is
5 the next Patel deposition from January 20, 2021, Page 122,
6 starting at line 15, the question was:

7 "Q. Besides this alleged statement by someone at Wash,
8 did PayRange have any other reason to believe that KioSoft was
9 willfully infringing PayRange's 296 patent?"

10 There was an objection.

11 "A. When we met in person with Mr. Li and Mr. Houser,
12 we had -- PayRange had a presentation chat that overviewed --
13 in part, overviewed the technology, and we had a patent mark or
14 symbol, if you would, on the side, and talked about our
15 technology and how it worked. Although we did not call out to
16 specifically what patent numbers were involved when that
17 happened, I just said that that was patented technology."

18 MS. BANTA: And your Honor, with regard to the alleged
19 PowerPoint that discussed patent, that has not been produce d
20 in discovery.

21 THE COURT: I still haven't understood where the
22 PowerPoint comes in, because I didn't hear that in what he just
23 advanced. I am a step behind. I don't know why you and
24 Mr. Roberts keep talking about a PowerPoint. I just don't know
25 where you are getting it from. Somebody testified there was a

1 PowerPoint?

2 MS. BANTA: Yes, your Honor. In Dr. Patel's testimony
3 he just read into the record.

4 THE COURT: Then I can't -- then I did not hear him
5 mention a PowerPoint. I may just be able to see the
6 transcript.

7 MS. BANTA: That is the presentation. He indicated it
8 had been marked with some patent indication on it. So, there
9 was something written that has not been produced in discovery.

10 THE COURT: Mr. Smith, can I -- do you mind if I see
11 the passage, please. I am having trouble following along this
12 argument.

13 MR. SMITH: Sure. The second one -- because I guess
14 there were two. There were the two transcripts.

15 THE COURT: I'm just looking for the part that counsel
16 is arguing.

17 MR. SMITH: 122, starting at line 15.

18 THE COURT: I see. Oh, "And the slide that talked
19 about our technology."

20 Okay. And from that, you deduced this was PowerPoint?

21 MS. BANTA: Yes, Your Honor.

22 THE COURT: Okay. I finally understand, sorry.
23 And it has never been produced in discovery?

24 MS. BANTA: Yes, Your Honor. So, there is no
25 corroboration for that dispute.

1 THE COURT: Got it.

2 MS. BANTA: With regard to plaintiff's claims
3 concerning copying of plaintiff's product and somehow putting
4 us on notice to search for patents, there is no evidence in the
5 record that there was ever any copying of plaintiff's product.
6 The best we got was that we have a similarly sized sticker
7 which, everyone agrees, isn't patented, is not covered by the
8 patents-in-suit.

9 So, there is simply no evidence that there was any
10 activity on the defendants' behalf that would have placed them
11 in the -- the set of facts covered by the Supreme Court case.

12 Additionally, stating something on information and
13 belief does not get plaintiff out of the jail on the false
14 factual allegations. Plaintiff -- paragraph 63 of plaintiff's
15 answer to the counterclaim confirms they did not have that
16 information. The willful blindness claim remains. And, unpled
17 theory, it is not in the complaint. With regard to having all
18 of the facts and allegations necessary to make such a claim, it
19 is a new theory, developed in order to try and save plaintiff
20 from this motion.

21 What plaintiff learned after filing of the complaint
22 does not support what it said in its complaint. It must have
23 known of those facts at the time it filed the complaint.

24 And, the fact that we declined to move for summary
25 judgment or to dismiss is irrelevant to the issue of whether

1 plaintiff's conduct is sanctionable.

2 Why would we vexatiously increase the cost of dealing
3 with that issue beyond this motion context when it should never
4 have been in the complaint to begin with?

5 And, with regard to the improper purpose, Judge Smith's
6 ruling on the not allowing us to file a defamation, per se,
7 count with regard to these willful infringement claims did not
8 consider the documents that we have adduced today concerning
9 dissuading, kneecapping, and killing, because plaintiff
10 successfully kept those materials out, as -- at least of the
11 Wilson Sonsini presentation -- as attorney/client privilege,
12 until it was later de-designated.

13 THE COURT: Is it your contention that the allegations
14 in the complaint -- that defendants' actions were either
15 willful, or that they have recklessly avoided knowledge of its
16 own infringement, even when faced with knowledge of PayRange's
17 own products and patents -- are insufficient to state the
18 willful blindness?

19 MS. BANTA: Yes, Your Honor. The specific terms that
20 are needed in order to state a claim for willful blindness
21 include a subjective belief concerning the issue that there may
22 be a fact, and then actual activity undertaken to avoid
23 learning of that fact.

24 And, those are the facts that needed to have been pled
25 if willful blindness was truly to be part of the complaint.

1 THE COURT: In your preparation for this hearing, did
2 you find any case that supported Rule 11 sanctions for
3 allegations of willfulness, patent infringement case, that
4 weren't supported by evidence?

5 There are none cited in the brief. Not in the motion
6 or reply.

7 MS. BANTA: No, your Honor.

8 THE COURT: The case on which the motion's reply seems
9 to rely most heavily refers to the entry of -- reverse entry of
10 sanctions as to a pro se movement.

11 So, I -- in my own search, didn't find any, and I
12 didn't know if you had any additional authority you wanted to
13 advance at the hearing. That's what I meant, in preparation.
14 That is what I wanted to ask, because I couldn't find it
15 either. Those were all my questions, Ms. Banta.

16 MS. BANTA: Thank you.

17 THE COURT: Okay. Does that conclude everyone's
18 presentation?

19 MS. BANTA: Yes, your Honor.

20 THE COURT: Mr. Smith?

21 MR. SMITH: Yes, your Honor.

22 THE COURT: Okay. Then let me give you back this.
23 I -- let me just quickly look at this binder and confirm it
24 doesn't have anything in it that I didn't accept into evidence
25 from the defendant.

1 Okay. Okay. I will take the matter under advisement
2 and file an order of report and recommendation as soon as we
3 can.

4 I appreciate everyone's time. I think you have all had
5 to travel here, too, didn't you?

6 I see nodding faces.

7 We are adjourned.

8 (Proceedings concluded at 1:19 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

Please note: This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

November 11, 2021
DATE

SHARON VELAZCO, RPR, FPR-C
Official Court Reporter
United States District Court
400 North Miami Avenue
Miami, Florida 33128

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