

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING AND CHRISTINE BOR-
ING, husband and wife respec-
tively,

CIVIL DIVISION

Plaintiffs,

CASE NO. 08-cv-694 (ARH)

v.

GOOGLE, Inc., a California corpo-
ration,

Defendant.

**PLAINTIFFS' MOTION TO VACATE IN PART
ORDER OF COURT DATED JULY 9, 2010, TO THE EXTENT OF THE
DISMISSAL OF PLAINTIFFS' MOTION TO CORRECT, CLARIFY OR CONFORM RECORD**

1. On June 16, 2010, the undersigned asserted errors in the re-
cord that require correction, clarification or conformance to the facts.
[Docket 91, 95-96]

2. The facts at issue regard items of procedure conducted with
this Court's personal involvement. Since the date of the motion, this
Court has all information to rule on the motion without delay.

3. On July 9, 2010 [Docket 98], this Court granted Plaintiffs'
April 6, 2010, motion to stay [Docket 66, 67]. In doing so, this Court
dismissed all pending motions without respective rulings thereon, includ-
ing the undersigned's motion to correct the record.

4. Plaintiffs' Petition for Writ of Certiorari does not provide a
basis to dismiss, or to delay, ruling upon the motion to correct. The re-
cord should be corrected or the motion otherwise ruled upon *because* the
record is or may be under review by the U.S. Supreme Court; the record
should not be with errors or claimed errors for the period *while* the
record is being reviewed or may be reviewed by the U.S. Supreme Court.

5. Although the substantive materiality of the issues are made
moot by the stay,¹ the record is a historical reflection of events, pre-
served for posterity irrespective of how this case progresses. A stay of
future events does not moot correction of historical events.

¹ Although the substantive motions are now dismissed, the motion to correct
was made with Plaintiffs' Status Report, because of the long pendency of the
discovery dispute which was prejudicing Plaintiffs' rights under the schedule.
[Docket 90, 97] The second error in the record, being more severe than the
first, portended a third error more severe than the second. The motion,
having been made and not withdrawn, should be properly ruled upon.

6. To wit:

- a. Google's attorney, Joshua Plaut, Esq., under penalty of perjury, signed a Declaration in support, testifying to "personal knowledge" of the facts asserted by him therein. [Docket 80, No. 1]
- b. Attorney Plaut declared by admission, **"On May 4, 2010, the parties appeared telephonically before this Court's clerk..."** [Id., No. 8] This was the proceeding scheduled to occur before this Court by this Court's Order [Docket 71[72]]² Attorney Plaut further testified to events that could be personally known by him only if he attended the proceeding.³ [Id.; Docket 80, Nos. 1 and 8]
- c. Attorney Plaut did not attend the May 4, 2010, proceeding. The Official Minutes [Docket 77] are correct on this point: indeed, the Official Minutes do not reflect Attorney Plaut's attendance at that proceeding. [Id.]
- d. The Official Minutes are not correct that the proceeding occurred "before" Chief Magistrate Judge Hay; Judge Hay did not attend the May 4, 2010 proceeding, but her law clerk conducted that proceeding. [Docket 91, 95]⁴
- e. The Official Minutes of the proceeding are correct that only Google's Attorney Tonia Klausner and the undersigned attended the proceeding. However, the proceeding was not before Chief Magistrate Judge Hay, but, if at all, before Elizabeth Brown, Esq., her law clerk.
- f. The Official Minutes are not correct in that that they do not identify Attorney Brown's attendance at the May 4, 2010 proceeding, nor that it was Attorney Brown who conducted the proceeding. It was Attorney Brown who, herself, requested emailed documents for submission immediately following the proceeding. [Docket 87, Nos. 17-18]

² **"ORDER that a telephone conference re: discovery dispute shall be conducted 5/4/2010 at 9:00 A.M. before Chief U.S. Magistrate Judge Amy Reynolds Hay. Chambers staff shall initiate the call. Signed by Chief U.S. Magistrate Judge Amy Reynolds Hay on 5/3/2010. ..."**

³ Attorney Plaut did not attend the proceeding, and his hearsay statements about conversations at the proceeding are incorrect and unlikely in the context. [See, Docket 87, Nos. 17-18]. If Attorney Plaut did attend that proceeding, then the Official Minutes would need to be corrected to identify his attendance. If Attorney Plaut did not attend that proceeding, then his Declaration is not grounded on personal knowledge. If Attorney Plaut attended the proceeding, or Judge Hay did not attend the proceeding, or if Attorney Brown attended and conducted the proceeding, then, the Official Minutes would need to be corrected, clarified or conformed, and Attorney Klausner's express opposition to any correction, clarification or conformance of the Official Minutes at Docket 95 is ungrounded.

⁴ **"Minute Entry for proceedings held before Chief Magistrate Judge Amy Reynolds Hay: Discovery Conference held on 5/4/2010. (Court Reporter:none) (bb) (Entered: 05/07/2010)"; [Compare, Dockets 80, No. 8; 87, No. 18]**

- g. The Official Minutes [Docket 77] entered by Judge Hay, do not reflect the hearsay through the testimony to her by her law clerk, Attorney Brown, as to any matter contained therein. The Official Minutes facially testify of Judge Hay's personal knowledge from the existence of a proceeding that did not occur before her in her presence.
- h. Notwithstanding the issues specifically raised in the undersigned's motion to correct, clarify or otherwise conform the record, by signed response and express opposition, filed at Docket 95, Google's Attorney Klausner asserts to this Court, the judiciary and the public that the docket entries accurately and forthrightly reflect the circumstances they purport to reflect. That is, that there is no forthright untruth and/or no good faith basis to either correct, clarify or conform the record.

7. The undersigned, respectfully and without intended offense, but to protect his client's rights, was compelled to file the motion to correct, clarify or otherwise conform the record [Docket 91] in conjunction with the Discovery Status Report [Docket 90]. Without the undersigned making that motion, an appeals Court would reasonably be calculated to have a very different and incorrect view of the historical events: including, to wit: i) that Attorney Plaut, as an officer of the court Declarant, had personal knowledge of the matters to which he testified under oath to support Google's position in the discovery dispute; ii) that there is a proper basis for this Court to rely upon Attorney Plaut's undocumented hearsay testimony in support of making a ruling; iii) that, in accordance with this Court's Official Minutes, that the proceeding was conducted before Chief Magistrate Judge Hay, and not her law clerk, Attorney Brown; and iv) that the elemental facts set forth in the record are facially and forthrightly correct pursuant to Attorney Klausner's signed opposition to any correction, or clarification or conformance. To allow a record to be in this condition, the undersigned asserts is not fair to Plaintiffs, the public or the greater judiciary.

8. The undersigned's motion should not be a matter for dispute or contention. The elemental facts are fully within this Court's own knowledge to correct, clarify or to conform – or not to do so – as required by truth and forthrightness to the Plaintiffs, the public and greater judiciary.

9. The integrity and reliability of the record for judicial processes is crucial for the proper final adjudication of rights. The undersigned asserts that the filings of record referenced now exist in their respective condition under a pending and immediate duty to correct, clarify and/or to conform with or without the undersigned's motion to do so.

If this Court determines that the record is forthrightly in proper condition for each instance identified, and even more particularly so in light of the specific issues raised herein and by the undersigned's motion to correct, clarify or to otherwise conform, the undersigned's motion may be immediately summarily denied without delay.

WHEREFORE, respectfully, the undersigned moves this Court to vacate, in part, that portion of its Order, dated July 9, 2010, whereby this Court dismissed Plaintiffs' motion to correct, clarify or otherwise conform the record, and to rule on Plaintiffs' motion to correct, clarify or otherwise conform the record [Docket 91] without additional delay.

Dated: July 19, 2010

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.
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CERTIFICATE OF SERVICE

The following person or persons are believed to have been served electronically in accordance with the procedures and policies for Electronic Case Filing (ECF) on this date.

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