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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2010-03652-BLS1

Notice sent 05.03.11 TFM DRT GTFM.LLP JMA/WFA CEH RCB SBM BM.LLP MC JCH GKW LFS LCK SKL ITM LLP (MD)

SKYHOOK WIRELESS, INC.

vs.

GOOGLE, INC.

MEMORANDUM OF DECISION AND ORDER ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT GOOGLE, INC.

After hearing, and review of all materials submitted, the Court concludes as follows. Insofar as the motion seeks dismissal pursuant to Mass. R. Civ. P. 12(b)(6), the allegations of the complaint, considered under the standard established in *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), are sufficient to state a claim. Insofar as the motion seeks summary judgment, the Court concludes, in the exercise of discretion, that consideration of summary judgment should be deferred pending completion of discovery. Accordingly, the Court will deny the motion without prejudice to the filing of a further motion for summary judgment thereafter.[1]

[1]If a further summary judgment motion is filed, the Court expects that the accompanying statement of facts and response pursuant to Superior Court Rule 9A(b)(5) will hew more closely to the requirements and purposes of the rule. The moving party's statement should set forth facts only, in concise numbered

Google's argument rests on three related theories: (1) its exercise of its rights under contracts with device manufacturers cannot fulfill the element of improper means or motive for purposes of claims of intentional interference with contractual or advantageous relations, and cannot violate G. L. c. 93A; (2) even if Skyhook could show improper conduct by Google, evidence already identified establishes that such conduct caused no harm to Skyhook, because it had no effect on the decisions of the two manufacturers in issue not to use Skyhook's product in their Android phones; and (3) Skyhook cannot show that the "actions or transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially in Massachusetts," as required for liability under G. L. c. 93A, § 11.

On the first point, Skyhook's response purports to dispute that Google has the contractual rights it claims. Having reviewed the contract provisions cited, the Court

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paragraphs, with precise record references. The requirement of a statement of legal elements was eliminated from the rule in 2009. The opposing party's response to each factual assertion should include nothing more than the word "disputed" or "undisputed,"and, in case of the latter, a precise reference to the evidentiary material on which the party relies to demonstrate the existence of a genuine factual dispute. Responses of "disputed" should be reserved for genuine factual disputes. Description or characterization of a contract or other document, or lengthy recitation of its contents, is unnecessary and unhelpful, as is lengthy quotation from deposition testimony. What is needed is simply a reference to the specific location in the record where the Court will find the material to which a party seeks to direct the Court's attention. Argument has no place in a Rule 9A(b)(5) statement; it belongs only in memoranda of law.

perceives no genuine factual dispute on this question. The content of the written contracts between Google and the manufacturers is established, and the meaning of the pertinent provisions appears clear: Google has the contractual right to prevent the manufacturers from distributing devices under the Android trademark with any software installed that, in Google's determination, would interfere with full functioning of Google's applications, including retrieval of location data.

It does not necessarily follow, however, that Google's exercise of its contractual rights could not have been improper for purposes of Skyhook's tort and c. 93A claims. Skyhook's theory, in substance, appears to be that Google used its contractual power not to protect its legitimate business interests, but to injure Skyhook and thereby avoid competition. Whether Skyhook will be able to elicit evidence to support that theory remains to be seen, but, at least at this stage, the Court cannot conclude that the theory lacks viability as a matter of law. See *Anthony's Pier Four, Inc.*, v. *HBC Associates*, 411 Mass. 451, 473-474 (1992) (bad faith exercise of discretionary right under contract constituted breach of implied covenant and violation of c. 93A).

As to the issue of causation, the evidence offered establishes, beyond any genuine dispute, that the two manufacturers in issue gave Skyhook reasons for their decisions that were unrelated to any conduct of Google. That does not, in itself, establish that the expressed reasons were the actual reasons, or that other

considerations, such as pressure from Google, played no role. Skyhook is therefore entitled to an opportunity to conduct reasonable discovery addressed to Google's conduct with respect to the two manufacturers in issue, its motivations for that conduct, and any effect Google's conduct may have had on the decisions those companies made regarding the use of Skyhook's product in Android devices.

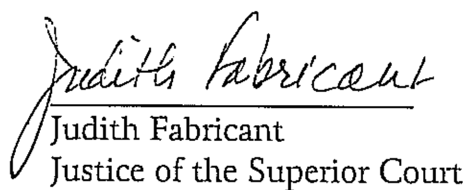
Whether the pertinent "actions or transactions" occurred "primarily and substantially" in Massachusetts, as is required for liability under G. L. c. 93A, § 11, depends on the location of the "center of gravity of the circumstances that give rise to the claim." *Kuwaiti Danish Computer Co.* v. *Digital Equipment Corporation*, 438 Mass. 459, 473 (2003). The question is by its nature factual, see *id.*, but that does not mean, as Skyhook seems to suggest, that the issue cannot be resolved on summary judgment. Factual questions can be, and often are, decided on summary judgment if the evidence is such that a reasonable fact-finder could reach only one conclusion. See, e.g., *Brunner* v. *Stone & Webster Engineering Corp.*, 413 Mass. 698, 705 (1992) (summary judgment is often, but not always, inappropriate with respect to factual questions such as motive, intent, or state of mind).

The evidence identified by Google indicates that the conduct in issue all occurred outside Massachusetts. Skyhook offers two responses: it needs further discovery; and it has suffered losses in Massachusetts, since it is based here. The latter point would not, it itself, suffice to avoid summary judgment. The location of

injury is a factor warranting consideration, see cases cited in *Kuwaiti Danish Computer Co.* v. *Digital Equipment Corporation*, 438 Mass. at 472, n. 13, but the Court is unaware of any case that has held sufficient the mere fact that a plaintiff is based in Massachusetts. Such a ruling, in the Court's view, would be inconsistent with the plain language of the statute. Whether further discovery will identify evidence regarding other factors pertinent to the analysis remains to be seen.

CONCLUSION AND ORDER

For the reasons stated, the Motion to Dismiss or, in the Alternative, for Summary Judgment in Favor of Defendant Google, Inc., is **DENIED**, without prejudice to any further motion for summary judgment after completion of discovery. Any such motion, and opposition thereto, shall comply strictly with Superior Court Rule 9A(b)(5).



Judith Fabricant
Justice of the Superior Court

May 2 , 2011

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