Perfect 10 Inc v. Google Inc et al	Doc. 930

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484-AHM (SHx)	Date	July 20, 2010
Title	Perfect 10, Inc. v. Google Inc.		

Present: The Honorable	Stephen J. Hillman	
Sandra L. Butler		
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: (IN CHAMBERS- TELEPHONIC)

For the reasons set forth below, defendant's Motion for Protective Order Regarding Deposition Notice Directed to Dr. Eric Schmidt (the "Motion") is GRANTED.

Defendant Google Inc. has moved for an order to protect its Chief Executive Officer and Board Chairman Dr. Eric Schmidt from being deposed by plaintiff Perfect 10, Inc. Plaintiff seeks information on: (1) defendant's polices and practices concerning programs such as Web Search, Image Search, Blogger, Blogspot, AdSense, and AdWords; (2) the draw of adult and infringing content; (3) defendant's policies regarding such key issues as copyright infringement, the adequacy of DMCA notices, and business dealings with infringing websites; (4) defendant's internal conversations and communications regarding these issues, including at defendant's board meetings and other high-level meetings; and (5) defendant's internal conversations and communications regarding plaintiff. (See Joint Stipulation 4:15-23, May 4, 2010). After deposing five other employees of defendant, plaintiff argues that it cannot obtain answers to basic questions regarding these issues. (See id. at 23:23-25:16).

The Court may issue a protective order if the moving party shows good cause therefore, such as to avoid "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).[1] Further, courts have recognized that the depositions of

[1] Plaintiff argues that based on Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), the Court should deny the Motion because defendant did not obtain a court order preventing Dr. Schmidt's deposition before May 7, 2010, the scheduled deposition date. However, that case involved a direct flaunting of the authority of a court for a failure to appear based on a motion to quash.

Dockets.Justia.com

CEO's or high ranking officials, also known as "apex" depositions, are usually unnecessary and raise the potential for discovery abuse and harassment. See, e.g., Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979) (noting that heads of agencies "are not normally subject to deposition"); Celerity, Inc. v. Ultra Clean Holdings, Inc., 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) ("Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment"); Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985) (holding that a company's chairman of the board was a "singularly unique and important individual" who could be "easily subjected to unwarranted harassment and abuse," that the court had a "duty to recognize this vulnerability," and that the chairman had a "right to be protected"); Baine v. General Motors Corp., 141 F.R.D. 332, 334 (M.D. Ala. 1991) (holding that deposition of vice president would be duplicative, inconvenient, and burdensome).

Courts in such situations shift the burden from the party seeking a protective order to the party seeking a deposition, and require the latter to prove that: (1) the CEO has unique, personal knowledge relevant to the merits of the lawsuit; and (2) there is no ability to obtain the information through other means. See, e.g., Salter v. Upjohn, 593 F.2d 649, 651 (5th Cir. 1979) (upholding district court's exercise of discretion in granting protective order to bar plaintiff from deposing president because he was extremely busy and lacked direct knowledge of facts in dispute, and other employees had more direct knowledge); Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995) (upholding district court's exercise of discretion in granting protective order to bar plaintiff from deposing chairman of the board of directors because the information plaintiff sought could be gathered from other personnel for which a deposition might have been less burdensome); Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989) (upholding district court's exercise of discretion in granting protective order to bar plaintiff from deposing chairman of the board of directors and chief executive officer who lacked knowledge about any facts pertinent to plaintiff's action).

Following the June 28, 2010 telephonic oral argument on the Motion, the Court finds that plaintiff has failed to show that Dr. Schmidt has unique, personal knowledge relevant to the merits of the lawsuit. Even after extensive discovery, including a court-

ordered search of Dr. Schmidt's email, and depositions of five other employees of defendant (See Joint Stipulation 9:11-19), there is no evidence that Dr. Schmidt has such knowledge. Further, though plaintiff argues that Dr. Schmidt has not submitted a declaration asserting that he has no knowledge or information regarding issues relevant to the lawsuit,[2] this is not required by the law, as several courts have issued protective orders to prevent apex depositions without such declarations. See, e.g., Baine, supra at 334; Salter, supra at 651; Lewelling, supra at 218.

Plaintiff also argues that the prior search of Dr. Schmidt's email is not determinative of his knowledge because of his admitted practice of quickly deleting emails. (See id. at 36:18-37:10). However, the Court has already found defendant's document preservation procedures adequate, thereby ensuring the retention of Dr. Schmidt's emails since July 2007 (nearly a year before defendant was ordered to produce documents related to Dr. Schmidt).

Further, the Court finds that plaintiff has failed to show the inability to obtain the information through other means. See, e.g., Salter supra at 651 (upholding protective order for executive when other witnesses "have more personal knowledge"). Instead of essentially leap-frogging to the pinnacle of defendant's corporate pyramid, plaintiff still has several more opportunities to depose employees of defendant who are the most knowledgeable on matters relevant to this lawsuit.

Other courts have precluded the depositions of defendant's senior executives, including Dr. Schmidt, under similar circumstances. See, e.g., Stelor Productions, Inc. v. Google Inc., No. 05-80387-CIV, 2008 WL 4218107, at *4 (S.D. Fla. Sept. 15, 2008) (barring depositions of defendant's co-founders where less burdensome means were not yet exhausted); PA Advisors, LLC v. Google Inc., No. 2:07-CV-562 DF (E.D. Tex. Aug. 29, 2009) (order barring deposition of defendant's co-founder, despite plaintiff's contention that co-founder was the only individual who could testify about his own actions following the receipt of a specific email, because plaintiff had failed to show that

[2] Citing General Star Indem. Co. v. Platinum Indem. Ltd., 210 F.R.D. 80 (S.D.N.Y. 2002). However, that case required such a declaration because there was proof that a CEO had unique, personal knowledge.

the deposition would yield relevant information that could not be obtained from other sources, and the deposition would cause a “significant disruption to defendant’s operations”).

The Motion therefore GRANTED.

It is so ORDERED.

cc: Judge Matz
Magistrate Judge Hillman
Parties of Record

______ : ______

Initials of Preparer ____________