

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THINK VILLAGE-KIWI,  
  
Plaintiff,  
  
v.  
  
ADOBE SYSTEMS, ET AL.,  
  
Defendants.

No. C 08-04166 SI

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
DISCOVERY REQUESTS  
[Docket Nos. 86, 88]**

Plaintiff has filed two letter briefs concerning discovery disputes. Plaintiff seeks an order (1) compelling responses to interrogatories and document requests, and (2) compelling defendants to produce certain witnesses for deposition.

**1. Plaintiff's Motion to Compel Responses to Interrogatories and Document Requests**

**A. Interrogatories 5 and 7**

Plaintiff seeks an order compelling defendants to respond to Interrogatories 5 and 7, which pertain to the development of defendants' Device Central software, the employees who contributed to the project, and the time period during which they did so. Plaintiff asserts that defendants have failed to provide verified responses to these interrogatories and to supplement the informal responses given on June 26, 2009 with complete time frames for all employees who worked on Device Central. Plaintiff also asserts that defendants have failed to identify all the documents responsive to Interrogatory 7.

With respect to plaintiff's first contention, defendant asserts that it has provided plaintiff with complete dates to the extent it has access to such information, and provided a verified response incorporating the information provided in its June 26 letter. With respect to plaintiff's second

1 contention regarding defendant's failure to identify documents responsive to the interrogatories,  
2 defendants state that the issue of identification was discussed at a June 5 meet and confer and that  
3 plaintiff's primary interest was in identification of witnesses and production, not listing, of the records  
4 related to the development of Device Central. Plaintiff's own submission appears to corroborate this  
5 position. *See* Sheikh Letter, ex. H to Decl. of David Mahalek in Supp. of Mot. to Compel Responses,  
6 at 3 [Docket No. 87]. Defendant asserts that it produced all of the requested documents ("Adobe has  
7 produced approximately **295 gigabytes** of records, and of these 85-90% can be deemed 'related' in some  
8 way to Device Central, in the sense that its lineage can be traced back over years of development  
9 work.") Nothing in the current motion demonstrates why production, as opposed to listing, is not  
10 adequate.

11 Because plaintiff is now in possession of the information sought, the Court DENIES as moot  
12 plaintiff's motion to compel interrogatory responses.

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14 **B. Document Request 30**

15 Plaintiff's second request is for an order compelling defendants to produce a February 2005  
16 agreement between Macromedia and Nokia regarding the technology underlying this dispute. The only  
17 portion of the agreement that has not been produced to plaintiff is Amendment No. 3. In a letter dated  
18 March 27, 2009, defense counsel indicated that defendants had in their possession an unsigned copy of  
19 Amendment No. 3, but wished to check with Nokia to see if Nokia had a final version of the  
20 amendment. Apparently after plaintiff filed the present motion to compel production, defendants  
21 informed plaintiffs that they were unable to obtain a copy of the amendment from Nokia, and forwarded  
22 the unsigned version that had been in defendants' possession.

23 These disputes are clearly the result of a breakdown in communication between the parties.  
24 Although defendant faults plaintiff for failing to inquire whether the requested documents were  
25 forthcoming before filing the present motions to compel, the Court observes that defendants apparently  
26 did not produce the requested documents until spurred to do so by plaintiff's filings. In any event,  
27 because plaintiff is now in possession of the information sought, the Court also DENIES as moot  
28 plaintiff's motion to compel further production of documents in response to Request 30.

1 **2. Plaintiff's Motion to Compel Deposition Testimony**

2 **A. Lack of Notice**

3 Plaintiff also seeks an order compelling defendants to produce 30(b)(6) witnesses on two topics:  
4 (1) the conception, design, development, and production of defendants' "Jingle" product, and (2)  
5 defendants' document management practices. Plaintiff deposed Jakub Plichta, defendants' 30(b)(6)  
6 designee with respect to the Jingle-related topics, and Carol Linburn, defendants' 30(b)(6) designee on  
7 document management practices, on July 23-24, 2009, but only in their personal capacities. Plaintiff  
8 now seeks an order compelling defendants to produce Plichta and Linburn as Rule 30(b)(6) witnesses.  
9 Plaintiff asserts that it lacked sufficient notice of defendants' designation of Plichta and Linburn as  
10 representative witnesses to prepare to question these witnesses on the 30(b)(6) topics at the July 23 and  
11 July 24 depositions.

12 The parties agreed on the dates of Plichta's and Linburn's depositions nearly a month in advance.  
13 Defense counsel stated in an email to plaintiff's counsel on June 29, 2009, "We will be producing Mr.  
14 Plichta and Ms. Linburn in their personal capacities and also for certain 30(b)(6) topics that we will  
15 designate immediately after we finish our meet and confer on the topics." *See ex. 8 to Decl. of Colette*  
16 *Verkuil* ("Verkuil Decl.") in Supp. of Oppo. to Mot. to Compel Depo. Testim. [Docket No. 93-8]. At  
17 a meet and confer on July 1, 2009, defense counsel stated that Plichta would be designated as  
18 defendants' 30(b)(6) witness for "the Jingle topics." *See Verkuil Decl.* ¶ 2. Defendants did not,  
19 however, provide formal notice of that designation, or of the designation of Linburn as the  
20 representative witness with respect to document management, until the evening of July 21, 2009, the  
21 day before plaintiff's counsel was set to travel from Chicago to California to take the Plichta and  
22 Linburn depositions. *Id.* ¶ 3. Defendants state that plaintiff should nonetheless have been prepared to  
23 take the 30(b)(6) depositions because the topics largely overlapped with the focus of the individual  
24 deposition questions.

25 Defendants are correct that plaintiff was not exactly blindsided by defendants' designations of  
26 Plichta and Linburn. On balance, however, the Court concludes that plaintiff is entitled to an  
27 opportunity to depose Plichta and Linburn separately on the 30(b)(6) topics. Individual and  
28 representative testimony are distinct in nature. Even if the general topics to be addressed at Plichta's

1 and Linburn’s 30(b)(1) and 30(b)(6) depositions will overlap to some extent, the questions asked and  
2 the answers given might not. *See Sabre v. First Dominion Capital, LLC*, No. 01-2145, 2001 WL  
3 1590544, at \*1 (S.D.N.Y. Dec. 12, 2001) (“A deposition pursuant to Rule 30(b)(6) is substantially  
4 different from a witness’s deposition as an individual. A 30(b)(6) witness testifies as a representative  
5 of the entity, his answers bind the entity and he is responsible for providing all the relevant information  
6 known or reasonably available to the entity.”) (citing 8A Charles A. Wright, Arthur R. Miller & Richard  
7 L. Marcus, *Federal Practice & Procedure* § 2103 (2d ed. 1994)).

8 Accordingly, the Court GRANTS plaintiff’s motion to compel defendants to produce 30(b)(6)  
9 witnesses on the topics described (Topics 9-10, 28, and 32-35). The parties shall arrange for depositions  
10 of these witnesses as soon as possible, but no later than **October 19, 2009**, the deadline for the  
11 completion of non-expert discovery in this case. The depositions shall be taken at plaintiff’s expense.

12  
13 **B. Work-Product Privilege**

14 Plaintiff seeks an order compelling defendants to produce a 30(b)(6) witness to answer certain  
15 questions regarding a statement made in a January 14, 2006 letter from Adobe’s in-house counsel, Ray  
16 Campbell, to Dr. T.W. Stevenson, who at the time was acting as the agent of plaintiff’s assignor, Kiwi,  
17 in asserting its claim against defendants. Plaintiff contends that defendants improperly asserted the  
18 attorney work-product privilege to prevent plaintiff from deposing various witnesses, including Adobe  
19 employees Fergus Hammond and Stephen Elop, regarding Campbell’s statement in the letter that “many  
20 OEM emulators like Nokia” existed prior to defendants’ development of Jingle, the product stemming  
21 from defendants’ alleged theft of plaintiff’s trade secrets. *See Campbell Letter*, ex. 10 to Verkuil Decl.

22 As described in plaintiff’s letter brief, plaintiff’s deposition questions sought yes or no answers  
23 regarding the following: whether defendants took steps to identify the Nokia emulator referred to in the  
24 Campbell letter; whether they succeeded in doing so; and whether they have documents regarding the  
25 emulator. *See Pltf. Mot. to Compel Depo. Testim.*, at 5 [Docket No. 88]. Plaintiff did not seek to  
26 question defendants’ witnesses regarding Campbell’s mental impressions or the basis for the statements  
27 in the letter. The Court finds that these questions are not precluded by the attorney work-product  
28 privilege. *See Fin. Tech. Int’l, Inc. v. Smith*, No. 99 CIV 9351, 2000 WL 1855131, at \*8 (S.D.N.Y. Dec.

1 19, 2000) (“The [work-product privilege] provides protection only for ‘documents and tangible things’  
2 and does not bar discovery of facts a party may have discovered from documents.”). Accordingly, the  
3 Court GRANTS plaintiff’s motion to compel production of 30(b)(6) witness(es) for deposition regarding  
4 the Nokia emulator referred to in the Campbell letter. At the deposition(s), defendants may not assert  
5 the work-product privilege to bar responses to the questions addressed above.

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7 **CONCLUSION**

8 For the foregoing reasons, the Court DENIES plaintiff’s motion to compel further responses to  
9 Interrogatories 5-7 and further production of documents in response to Document Request 30, and  
10 GRANTS plaintiff’s motion to compel production of 30(b)(6) witnesses regarding Topics 9-10, 28, 32-  
11 35, and 36. [Docket Nos. 86, 88].

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13 **IT IS SO ORDERED.**

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15 Dated: October 5, 2009

  
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SUSAN ILLSTON  
United States District Judge