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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 12 80 261 MISC
Case No. _____ -MISC

MOBILEMEDIA IDEAS LLC,
Plaintiff,
v.
GOOGLE INC.,
Defendant.

MOBILEMEDIA IDEAS LLC'S MOTION TO COMPEL GOOGLE INC. TO COMPLY WITH THE JULY 20, 2012 SUBPOENA ISSUED TO GOOGLE INC. BY MMI

[Declaration of Laurie Stempler and [Proposed] Order filed concurrently herewith]

Date: To Be Determined
Time: To Be Determined
Courtroom: To Be Determined
Location: To Be Determined

FILED
2012 OCT 26 P 2:52
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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TO DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that as soon as the matter may be heard in the above-entitled Court, Plaintiff MobileMedia Ideas LLC ("MMI") will and hereby does move the Court for an order compelling the Defendant, Google Inc. ("Google") to comply with the subpoena that MMI has issued to it and to produce and permit for inspection and copying the materials specified in that subpoena pursuant to Federal Rule of Civil Procedure 45.

By this Motion, MMI seeks an order from this Court directing Google to comply with the validly issued subpoena that MMI has issued to it and to produce the materials described therein. As will be explained in more detail below, those materials would be of assistance to MMI in the case *MobileMedia Ideas LLC v. HTC Corp.*, Civil Action No. 2:10-cv-00112 (E.D. Tex.).

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Laurie Stempler filed concurrently herewith, all matters of which judicial notice may or must be taken, and such further oral or documentary evidence and memoranda as may be presented to the Court at or prior to any hearing on this Motion.

This Motion is made following the meet-and-confer conferences of counsel pursuant to Local Rule 37-1(a), which took place on August 28, September 27, October 11, and October 19, 2012. Declaration of Laurie Stempler, ¶¶ 3, 5, 6, 7.

DATED: October 26, 2012

SALLY M. HANDMAKER
PROSKAUER ROSE LLP

By: Sally Handmaker
Sally M. Handmaker

Attorney for Plaintiff,
MOBILEMEDIA IDEAS LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 Plaintiff MobileMedia Ideas LLC (“MMI”) respectfully files this Motion to Compel
5 Google Inc. (“Google”) To Comply With The July 20, 2012 Subpoena Issued To Google Inc. by
6 MMI. In the three months since MMI served its subpoena on Google, MMI has met and conferred
7 with Google’s counsel on multiple occasions in an effort to understand and address Google’s
8 questions about the subpoena and further specify the nature of the documents it seeks. In fact,
9 MMI has provided *two* narrowed lists of document categories that it seeks from Google. In the
10 interest of avoiding motion practice, MMI proposed that Google, who has repeatedly directed
11 MMI to defendant HTC for the requested documents, provide written confirmation of the
12 categories of documents in HTC’s possession. Google refuses to cooperate on all fronts, leaving
13 MMI with no further recourse but to seek relief from this Court.

14
15 **II. FACTUAL BACKGROUND**

16 MMI has sued HTC for infringement of eleven patents that cover technology related to
17 smartphones. Half of the twenty-eight accused products operate using Google’s Android
18 Operating System (the “Android OS”): Aria, Desire, Droid Eris, Droid Incredible, EVO 4G, EVO
19 Shift 4G, G1, G2, Hero, myTouch 3G, myTouch 4G, Nexus One, Thunderbolt, and Wildfire
20 (collectively, the “Accused Products”).

21 On July 20, MMI issued a subpoena to Google, seeking documents that reflect the use of
22 Google’s Android OS in the Accused Products. (Declaration of Laurie Stempler ¶ 1 & Ex. A
23 thereto (“Stempler Decl.”).) On August 6, Google objected to all of MMI’s requests. (Stempler
24 Decl. ¶ 2 & Ex. B.) In the time between its receipt of Google’s objections and responses and the
25 filing of this motion, MMI has met and conferred with Google four times and has narrowed its
26 categories of documents twice. During each discussion, MMI provided discrete, specific,
27 responsive documents to aid Google’s search. (See Stempler Decl. ¶ 3 & Ex. C.) Almost two
28 weeks later, Google informed MMI that it maintained its objections to the subpoena and suggested

1 that MMI seek the requested documents from HTC. (Stempler Decl. ¶ 4 & Ex. D.) When the
2 parties again met and conferred, Google proposed producing to MMI a generic, non-descript
3 package of materials that it routinely produces to litigants in response to a subpoena in exchange
4 for MMI formally withdrawing its subpoena. (Stempler Decl. ¶ 5 & Ex. E.) Without knowing the
5 contents of this routine production, MMI was forced to consider how to further narrow its requests
6 and, consequently, provided an even narrower set of document descriptions to Google with the
7 hopes of assisting Google to either easily locate and produce the requested documents or confirm
8 that they are in HTC's possession. (Stempler Decl. ¶ 6 & Ex. F.)

9 To date, Google has not even attempted to locate any of the documents that MMI seeks
10 and instead has stonewalled MMI's efforts to obtain relevant, responsive documents. Google
11 contends that HTC possesses all of the requested materials. But when MMI requested written
12 confirmation from Google regarding HTC's possession of the documents it seeks, Google refused
13 to do so. The parties met and conferred on October 19, 2012, when Google reaffirmed its position
14 that MMI should seek the requested materials from HTC and took the position that MMI must
15 formally withdraw its subpoena before Google will consider searching for the narrowed
16 categories.

17
18 **III. ARGUMENT**

19 Federal Rule of Civil Procedure 45 permits litigants to seek discovery from third parties.
20 Fed. R. Civ. P. 45. The scope of discovery sought under Rule 45 is the same as that which applies
21 to the parties in the case under Rule 34. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679 (N.D. Cal.
22 2006) (granting motion to compel third party to comply with subpoena where requests were
23 negotiated and narrowed). The party seeking the third party discovery must be mindful of the
24 burden that it is imposing on the third party: "A party or attorney responsible for issuing and
25 serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a
26 person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). But documents sought by a subpoena
27 need only be relevant to the claims and defenses in the action. Further, Rule 45 permits the party
28 seeking discovery to move the Court to compel the third party to comply with the subpoena. Fed.

1 R. Civ. P. 45(c)(2)(B)(i). This Court has taken the position that, when in doubt, it should permit
2 discovery from a third party. *Gonzales*, 234 F.R.D. at 680-81.

3 The information that MMI seeks from Google is directly relevant to issues of infringement
4 in MMI's litigation against HTC. HTC has essentially fingered Google as the controlling entity
5 responsible for the design of the Accused Products. During a hearing for HTC's motion to
6 transfer venue out of the Eastern District of Texas, HTC affirmed that Google was responsible for
7 the design and implementation of the features accused of infringing the claims of the patents-in-
8 suit. (*See* Stempler Decl. ¶ 8 & Ex. G at 17:23-23:5.) Consequently, MMI has requested
9 documents concerning use of the Android OS in the Accused Products, including agreements
10 between Google and HTC, technical manuals related to the Android OS, and any source code used
11 on HTC smartphones that is unique to Android but not yet public. (*See, e.g.*, Stempler Decl. ¶¶ 1,
12 3, 6 & Exs. A, C, F.) These documents are unquestionably relevant, likely in Google's possession,
13 and easy to collect and produce.

14 Google's suggestion that it produce to MMI a standard package of materials that it
15 routinely produces in cases involving Android OS does not satisfy the subpoena and, as was
16 relayed to Google, this package is likely broader and narrower than the requested documents.
17 MMI informed Google that it was willing to receive this production but would still require the
18 specifically identified documents in its letter. However, Google would only produce this "stock"
19 package on the condition that would withdraw the subpoena or that such a production would
20 satisfy the subpoena in full. But MMI cannot blindly accept a nondescript production with
21 unknown contents as satisfying Google's obligations under the subpoena. Given that Google
22 routinely produces this stock set of documents to litigants in response to the third party subpoenas
23 that it receives, this production is unlikely to contain the confidential documents that MMI seeks,
24 such as Google's agreements with HTC. As MMI noted during its conferences with Google,
25 withdrawing its subpoena in exchange for a production with unknown contents would deprive
26 MMI of its rights to obtain relevant discovery under the Federal Rules.

27 MMI has made every effort to reach a compromise with Google. Google has delayed
28 providing an adequate response to the subpoena for three months and has continually ignored

1 MMI's narrowed document requests. (*See, e.g.*, Stempler Decl. ¶ 9 & Ex. H.) Google persists in
2 refusing to produce the requested materials and instead asks MMI to formally withdraw its
3 subpoena before Google will even consider initiating for documents responsive to the narrowed
4 set of requests. Indeed, Google has neither run a single search for any of the documents that MMI
5 seeks nor denied that such documents are within its possession. Google's position is senseless
6 given that MMI provided a simple set of documents that Google could have easily used to search
7 across its files. (*See, e.g.*, Stempler Decl. ¶ 6 & Ex. F.)¹

8 While MMI made a good faith effort to resolve this dispute without involving the Court,
9 the close of fact discovery in MMI's litigation against HTC is less than six weeks away.
10 (Stempler Decl. ¶ 10 & Ex. I.) MMI cannot experience any further delay in obtaining relevant
11 materials from Google. After numerous attempts to compromise, and now under the pressure of
12 the impending deadline, MMI seeks this Court's intervention to resolve the matter between MMI
13 and Google and respectfully requests that the Court grant its motion to compel Google to comply
14 with MMI's July 20, 2012 subpoena.

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19 ¹ As an alternative to formally withdrawing its subpoena, Google has stated that MMI
20 should first exhaust its ability to obtain the requested materials from HTC before burdening
21 Google to produce the responsive documents. Google cites an order in *Intermec Techs. Corp. v.*
22 *Palm, Inc.*, No. C 09-80098 MISC WHA (N.D. Cal. May 15, 2009) to support this proposition.
23 But several factual distinctions from *Intermec* make it inapplicable here. Unlike *Intermec*, who
24 requested an ever-expanding universe of documents for Google to search, MMI has already
25 narrowed the categories of documents it seeks - twice. (Stempler Decl. ¶¶ 3, 6 & Exs. C, F.) In
26 addition, while Google did not have an interest in the patent litigation between *Intermec* and *Palm,*
27 *Inc.*, here, Google is a real party in interest with respect to the Accused Products. (*See* Stempler
28 Decl. ¶ 8 & Ex. G at 17:23-23:5.) Finally, *Intermec* served its subpoena at the end of fact
discovery, which had already been extended. In contrast, MMI served Google with its subpoena
more than four months prior to the close of fact discovery and has been attempting to reach
agreement with Google concerning the subpoena since then.

26 MMI requested written confirmation from Google regarding the requested categories of
27 documents that are in HTC's possession, but Google refuses to confirm in writing HTC's
28 possession of the requested documents. Google's inconsistent position is convenient only for
Google and, less than six weeks from the close of fact discovery in MMI's litigation against HTC,
costs MMI every day.

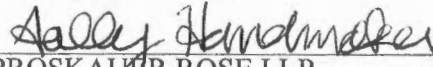
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IV. CONCLUSION

For all the foregoing reasons, MMI's Motion should be granted and Defendant should be ordered to comply with the subpoena that MMI has issued to it and to produce the materials described therein.

Dated: October 26 2012

Respectfully submitted,


PROSKAUER ROSE LLP
Sally M. Handmaker

Attorney for Plaintiff,
MOBILEMEDIA IDEAS LLC