

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 06-60905-CIV-ALTONAGA/Turnoff

F & G RESEARCH, INC.,

Plaintiff,

vs.

GOOGLE INC.,

Defendant.

**MOTION AND MEMORANDUM OF LAW TO COMPEL DISCOVERY AND  
FOR SANCTIONS RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Plaintiff, F & G Research, Inc. (“F&G”), by and through its undersigned counsel, hereby moves for an Order pursuant to the Federal Rule of Civil Procedure 37(d), directing Defendant, Google Inc. (“Google”) to produce for an oral deposition its marketing director and software design engineer, Brian McClendon.

**I. Facts**

On May 21, 2007, F&G notified Google’s counsel to present Google’s software design engineer, Brian McClendon, and the marketing director of Google for a deposition on May 25, 2007, in San Jose, California at 10:00 a.m. and 2:00 p.m. respectively on the same day.<sup>1</sup> This was the second time this deposition was noted, but Defendant Google refused to produce these individuals to be deposed ever, after consultation in a good faith attempt to resolve this matter.<sup>2</sup>

<sup>1</sup> The Notices of Deposition is attached, as Exhibit A

<sup>2</sup> See correspondence attached as Exhibit B.

## **II. Argument**

The failure to act cannot be excused on the ground that the discovery sought is objectionable, unless the party failing to act (Google) has a pending motion for a protective order. *See Fed. R. Civ. P. 37(d)* (“the failure to act ... may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has a pending motion for protective order ...”) It does not.

Nevertheless, the correspondence attached in Exhibit B states why said depositions are relevant. The Court has scheduled and ordered a claim construction briefing and a subsequent Markman Hearing in this patent infringement action, which briefing commences on June 29 and the hearing is scheduled on August 1, 2007.<sup>3</sup> In order to be prepared to brief the claim construction relating to direct infringement and active inducement of infringement of the method of claim 12 of the patent-in-issue (“229 patent”), a detailed explanation of the Google Software and its virtual operation is required. There is nothing of record to date which relates to this issue. Therefore, the depositions are not only relevant but crucial prior to the June 29 deadline imposed by the Court to file the opening brief.

## **III. Certificate of Good Faith**

In accordance with the Local Rule 7.1.A.3 and Fed. R. Civ. P. 37(a)(2), counsel for F&G has made a good faith effort to resolve the discovery dispute discussed herein by conferring with counsel for Google. Specifically, counsel for F&G has asked Google to produce Mr. McClendon and the marketing director, but Google refuses to do so. *See Exhibit B.*

## **IV. Motion for Sanctions and Attorneys Fees**

Defendant Google will not produce its marketing director or its software design engineer for a deposition. F&G is requesting this deposition to gather relevant and crucial information to

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<sup>3</sup> See attached order, Exhibit C.

put forth arguments in the claim construction brief, which must be filed on or before June 29, 2007. Google's refusal has necessitated the filing of this motion to compel. As an appropriate sanction, Plaintiff requests that Google bear the cost of the deposition as specified in Rule 37(b)(2), for a failure to abide by the rules of discovery.

**V. Conclusion**

For the foregoing reasons stated herein, Plaintiff respectfully requests this Court enter an Order compelling Defendant Google to produce its marketing director and its software design engineer, Brian McClendon for a Deposition with five (5) days of the date of a ruling on this motion, together with costs and fees associated with the preparation and filing of this motion, and such other further relief as this Court may deem just and proper.

Respectfully submitted,

ALLEN D. BRUFISKY, PA

Dated: June 3, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>th</sup>, day of June, 2007, I electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record: **Gregory Hillyer and Ramsey Al-Salam**, and I certify that I have mailed the foregoing document to the following parties or counsel of record who are non-CM/ECF participants: NONE.

s/ Allen D. Brufsky  
Allen D. Brufsky, Esq.