UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Palm Beach DIVISION

STEVEN A. SILVERS, an individual,
Plaintiff,
v.

GOOGLE INC., a Delaware corporation,
Defendant.

CASE NO. 05-80387-CIV
(Ryskamp/Vitunac)

GOOGLE INC., a Delaware corporation,
Counterclaimant,
v.

STEVEN A. SILVERS, an individual; STELOR PRODUCTIONS, INC., a Delaware corporation; STELOR PRODUCTIONS, LLC; a business Entity of unknown form; and STEVEN ESRIG, an individual,
Counterdefendants.

SILVERS' REPLY TO GOOGLE'S OPPOSITION TO SILVERS' MOTION FOR PROTECTIVE ORDER

Phase One of this case does not include the trial of the cross-claim brought by Stelor against Silvers, and for good reason. This case is first and foremost a reverse trademark infringement action brought by Silvers against Google for the damage cause to him by Google's junior use of an identical mark. Google moved to bifurcate the trial of that claim to first determine apart from all other issues and claims in this litigation (including the counterclaim Google filed against Silvers) whether Silvers' superior trademark rights are valid and enforceable - - alleging that Silvers may have abandoned his trademark prior to bringing this action. Google did not move to bifurcate and try separately in this first phase the cross-claim brought by Stelor against Silvers, and neither has Stelor or Silvers. In fact, Stelor has stipulated in response to Silvers' Motion For Protective Order that the scope of Phase One discovery is confined to Silvers' trademark ownership rights.

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Google now contends for the first time that Stelor and Silvers must litigate the cross-claim in Phase One. No one, including the Court, has ever suggested the cross-claim is part of Phase One. In fact, the Proposed Scheduling Order the parties submitted, and the Scheduling Order issued by the Court makes no mention whatsoever of the cross-claim. Furthermore, Silvers and Stelor's discovery cut-off for Phase One has passed. Google's only support for wanting to now inject the cross-claim into Phase One comes from a single sentence in an unrelated order where the Court, in denying Silvers' request to dismiss the cross-claim, mentions that the contract issue between Stelor and Silvers "will need to be addressed before the Court can reach the trademark infringement claims." That is far short of ruling that the cross-claim, which involves three separate Counts and three different contracts between Silvers and Stelor, must be tried in Phase One. Stelor and Silvers have not engaged in any discovery relating to the cross-claim, and in fact, would not have been able to complete that discovery in the shortened discovery period provided for in Phase One.

Furthermore, Google is absolutely wrong when it argues that resolving the cross-claim "promotes the possibilities of settlement because it will eliminate an alleged rights holder." Silvers is the sole owner of every aspect of the Googles IP and has all the rights associated with that; Stelor has always been a mere licensee. Even if Stelor prevails on its claim that Silvers wrongfully terminated its license (an unlikely outcome) that would not alter the fact that Silvers' owns all the rights to the Googles IP, nor vest Stelor with any ownership rights. In fact, prevailing on the cross-claim would not even reinstate Stelor's licensing rights because Stelor's only remedy for breach of the License Agreement is governed and confined by the limited liability provision contained in the License Agreement, which strictly limits Stelor's remedy to money damages.

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For these reasons, the Court should grant Silvers' request for a Protective Order, or simply deny it as moot based on the non-objection filed by Stelor.

Respectfully submitted,

s/ Gail A. McQuilkin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail and U.S. mail on this 15th day of August, 2006 upon:

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