IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JONATHAN COBB,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION FILE
	:	NUMBER 1:08-CV-0483-MHS
GOOGLE, INC.; and	:	
WORKFORCELOGIC USA;	:	
	:	
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM DEFENDANT GOOGLE, INC.

Plaintiff Jonathan Cobb has moved the Court for entry of an order compelling Defendant Google Inc. ("Google") to provide responses and documents in response to Plaintiff's discovery requests. Plaintiff also asks the Court to order Google to provide full and complete Initial Disclosures.

STATEMENT OF THE CASE

1. Nature Of The Case.

Plaintiff Jonathan Cobb brings Georgia state law claims for misappropriation of his original concepts and ideas relating to a virtual planetarium program called *Google Sky*. Defendant Google is operator of a

planetarium program which it publicly announced as *Sky in Google Earth.* It is commonly referred to as *Google Sky.* Plaintiff states related claims for fraud and fraudulent inducement, implied contract, unjust enrichment and conversion. (First Amended Complaint).

Beginning in February 2006, Mr. Cobb was hired in Georgia as a temporary employee of Google. Plaintiff's hiring was accomplished through Google's employee contractor, WorkforceLogic LLC. Responding to Google's stated interest in encouraging and rewarding innovative ideas, Plaintiff established a private Google e-mail discussion group in which he presented, advanced and refined his concepts and ideas for a Google Sky planetarium program. When forming his Google discussion group, Plaintiff invited as participants certain Google employees with managerial or operational responsibility for Google Earth and related programs.

Among the features presented and proposed by Plaintiff for his Google Sky planetarium program were the following:

(a) An interface similar to that of Google Earth with upgrades, including the presentation of a Day and Night view and related space imagery;

(b) An interface with differing telescope control systems;

(c) Access to and the ability to use GPS devices for positioning information;

(d) Object tracking;

(e) Forecasting;

(f) The ability to subscribe to high resolution imagery from earth and space-based telescopes;

(g) Live image overlay and recording ability; and

(h) Optical modulation measurement.

Plaintiff alleges that Google, working in concert with Defendant WorkforceLogic LLC, took the concepts and ideas presented by Plaintiff, and, without extending notice or credit to him, used them as its own. Approximately 17 months after Plaintiff commenced temporary employment with Google, Google announced its own *Sky in Google Earth* program.

2. Nature Of The Pending Discovery Dispute.

As stated in the parties' Joint Preliminary Statement And Scheduling Order, Initial Disclosures were to be supplied by the parties when responding to their separately served interrogatories and requests for production of documents. The point in stipulating this approach was to make more efficient the collection of information, sparing counsel the need to gather and present data both when responding to Initial Disclosures and

when answering the parties' own discovery requests. The parties agreed to exchange their information on June 20, 2008. Google, however, failed to provide *any* Initial Disclosure information. Google also failed to provide answers and to produce documents responsive to a substantial number of Plaintiff's First Interrogatories and First Requests for production. Google initially justified its failure to supply Initial Disclosure information as a natural outgrowth of its right to object to Plaintiff's discovery requests.

3. Efforts To Resolve The Discovery Dispute.

Plaintiff has attempted to resolve this dispute over a period of weeks and months. His efforts have met with only limited success. In response to Plaintiff's formal demand, Google subsequently provided limited Initial Disclosure information on August 1, 2008. However, Google's responses are ridiculously incomplete. Google's Initial Disclosures detail only that information which Google considers pertinent to a "first phase of discovery;" a discovery phase which Google has unilaterally determined should exist. By way of example, rather than providing Plaintiff, as our Local Rules require, with the names, addresses and contact information of all persons who have knowledge and information of Defendant's defenses, Google has supplied just four (4) names. It has elected to do so unilaterally, without first seeking permission from the Court or reaching agreement with

Plaintiff. Indeed, Google acts throughout as if *it* is entitled to determine what is fair or reasonable to disclose.

Google claimed that it was entitled to avoid the provision of Initial Disclosure information through its objections to Plaintiff's separately served discovery requests. While this stands the parties' agreement for the exchange of Initial Disclosure information effectively on its head, such conduct also precipitates the second and third prongs of Plaintiff's Motion To Compel – having to do with Google's refusal to provide Interrogatory answers and to produce documents specified in Plaintiff's discovery requests.

When the disputes first arose, counsel for Plaintiff and Google conferred by telephone, on July 2, 2008. Google's counsel explained that he believed discovery should proceed in a phased approach. As justification, he cited the large volume of information and expense which would be implicated by a full discovery undertaking. Plaintiff's counsel noted that Google's failure to provide Initial Disclosures was unacceptable as a threshold matter, as was its failure to provide other relevant discovery, most of which had nothing to do with any "phased" discovery considerations. But in an effort to advance discussions, Plaintiff's counsel announced his willingness to consider a phased approach, provided agreement could be reached on all of the discovery that was then due. Plaintiff's counsel then put

into writing specific ideas for how a phased approach might proceed, focusing on how Google might meet its obligations - at least preliminarily - when responding to Plaintiff's document Request No. 1.

Request No. 1 is the broadest of Plaintiff's document requests, seeking production of "all documents and things evidencing, reflecting or relating to the development of the Sky in Google Earth program by Google, Inc." Plaintiff proposed to have Google meet its obligations under Request No. 1 by first producing business case documents, product feasibility documents, product planning documents, product requirements analysis documents, product design documents, product roadmap documents and development calendar documents, together with related e-mail, as these were the kind of documents that would bear on the conceptualization, design and feature-development of the Google Sky program. These documents were ones in which a misappropriation of Plaintiff's ideas might be disclosed.

This approach was addressed in counsel's letter to Google's attorney dated July 11, 2008. Because Google had failed to provide *any* Initial Disclosure information, that omission was likewise addressed in the July 11 correspondence. A true and correct copy of the July 11, 2008 letter is attached to this Memorandum as Exhibit "A."

On July 25, 2008, Google's attorney responded. He did not address Plaintiff's proposal in any detail, merely referring to Google's own skeletal proposal for phased discovery. He described these phases as encompassing: (1) when did Google first conceive and begin development of Google Sky? and (2) did Google incorporate Mr. Cobb's ideas into Google Sky? No assurances were offered concerning the production of documents or witness information. To the contrary, Google's attorney insisted that his client had acted properly in providing no Initial Disclosures information. Still, he announced that his client would provide some Initial Disclosure information by August 1, 2008, simply in order to avoid a formal dispute. The letter of July 25, 2008 from Google's attorney is attached to this Memorandum as Exhibit "B."

When Google's Initial Disclosures arrived on August 1, they listed just two (2) employees and two (2) non-employees as persons with knowledge and information. The Disclosures listed no specific documents, only categories and their location. Because Google has interposed objections to Plaintiff's separately served document Requests, the bulk of those identified documents have never been produced. A true and correct copy of Google's Initial Disclosures is attached to this Memorandum as Exhibit "C."

For his part, Plaintiff has produced each and every document relating to this case which he knows to be in his possession. He has provided complete responses to Google's First Interrogatories. One item referenced by Google as still due from Plaintiff – a power point presentation relating to Plaintiff's original ideas - has not been produced. This is due to the fact that Plaintiff can not locate it, which has been reported directly to Google's counsel. Efforts to find the presentation are continuing, and assurances have been given that if the presentation is found it will be produced immediately.

Counsel spoke again by telephone on August 6, 2008 about the status of discovery. It was noted that Google had not responded to Plaintiff's detailed suggestions for Google's requested phased discovery. The details of same were discussed anew, and Google's counsel reported that he would take back the discussion points to Google's in-house attorney and then get back with Google's position. However, on August 19, 2008 Google's counsel, Michael Zwibelman, informed the undersigned that he was resigning his employment with the firm of Brune & Richard LLP. Mr. Zwibelman stated that contact would be made within a matter of days concerning his replacement and steps for moving the case ahead. No contact was in fact received until August 29, 2008, when a voice-mail message was left by Eric Schroeder of the Atlanta firm Powell Goldstein, LLP. Mr.

Schroeder's message announced that he was assuming the lead counsel position on Google's behalf.

Mr. Schroeder and the undersigned conferred by telephone on Tuesday, September 2, 2008. Mr. Schroeder announced that he was aware of the pending discovery dispute, but he reported that he would not be able to state what Google's position would be until the company's in-house counsel returned from her vacation on September 15, 2008.

The undersigned has now waited until September 18, 2008 to file this motion. No further response from Google has been received. A full three (3) months has been consumed waiting for Google to apprise Plaintiff of its position. Reluctantly, Plaintiff has concluded that Google aims to frustrate Plaintiff's discovery through delay and obfuscation, squeezing Plaintiff's ability to prepare his case in the dwindling amount of time which remains.

ARGUMENT AND CITATION OF AUTHORITIES

I. The Legal Standard Governing Motions to Compel.

Under the Federal Rules of Civil Procedure, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. FED. R.

CIV. P. 26 (b) (1). As a general matter, "relevance" for discovery purposes is broadly construed, and the information sought need not be admissible at the trial if it appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). It is not proper grounds for objection that the information sought will not be admissible at trial so long as the requested material could lead to other information that may be relevant to the subject matter of the action. *See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).* Relevance under Rule 26(b)(1) is broadly construed "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, *any issue that is or may be in the case.*" *Hickman v. Taylor, 329 U.S. 495, 501 (1947)* (emphasis added).

If one party does not comply with discovery requests, the opposing party may present a motion seeking to compel responses. Fed.R.Civ.P. 37(a) (1). If the Court finds that one or both parties faltered in their discovery obligation, it has discretion, under Rule 37(a) to compel appropriate responses. The party opposing a properly filed motion may be required to pay the costs associated with filing the motion. Fed.R.Civ.P. 37(a)(4)(b). The trial court also has discretion to sanction any party that does not comply with its orders. Fed.R.Civ.P. 37(b).

II. Initial Disclosures.

Initial Disclosures are employed to elicit basic information about the case at an early point. *Stamps v. Encore Receivable Mgmt., 232 F.R.D. 419 (N.D. Ga. 2005).* This Court's Local Rules specify their provision.

Google requested, and Plaintiff agreed, to have the parties' Initial Disclosures information served together with or as a part of the parties' responses to their respective first interrogatories. Google explained its request as making the gathering and reporting of that information more efficient; to permit counsel to pull together information in a single undertaking rather than two. The parties agreed that the information would be due on June 20, 2008.

On June 20, 2008, Plaintiff served his Initial Disclosures together with his responses to Google's First Interrogatories and First Request for production of documents and things. Google served no Initial Disclosures, either separately or as part of its other discovery responses. While it served written responses to Plaintiff's First Interrogatories and First Requests, it objected to them in substantial part. Many of Google's objections were formulaic in nature, claiming burdensomeness and vagueness. Many others had to do with its insistence that Plaintiff was obliged to make further disclosures of his concepts and ideas before Google was obliged to produce

any substantive information. Whether such objections were valid, Plaintiff made further disclosures in his discovery responses of July 20, 2008, rendering that particular objection moot.

On July 2, 2008, the parties' counsel discussed these points by telephone. They also discussed Google's request that discovery proceed in two phases. Even though Google had not yet fulfilled its own independent discovery obligations, Plaintiff agreed to consider a phased discovery approach. Plaintiff's consideration was so earnest that he outlined a proposal in his attorney's letter of July 11, 2008.

By letter dated July 25, 2008, Google's attorney responded to report that Google was not deficient in its failure to provide Initial Disclosure information, arguing that its duty to make Disclosures was trumped by its ability to object to Plaintiff's separate discovery requests. Perhaps uncertain of his own bravado, Google's attorney announced that he would serve Disclosures on August 1. But as for Plaintiff's written discovery proposal, no substantive response was offered, simply an acknowledgement that Plaintiff appeared open to the concept of a phased approach.

When served, Google's long awaited Initial Disclosures were incomplete. Google identified just four (4) individuals as having knowledge and information concerning its defenses to Plaintiff's claims, despite the fact

that this action concerns a fully-featured high-profile software program. To suggest that just four (4) persons possess all of the knowledge and information necessary to address or refute Plaintiff's claims of misappropriation is ludicrous. What Google is instead doing is managing the information it will disclose, steering what deposition discovery it will subsequently permit by its limited listing of knowledgeable individuals, and thwarting Plaintiff from having the information to which he is entitled. This Google may not do.

III. Plaintiff's First Continuing Interrogatories.

A party resisting discovery has a heavy burden of showing why discovery should be denied. *Williams v. Art Inst., 2006 U.S. Dist. LEXIS 62585 (N.D. Ga. Sept. 1, 2006)*. Google has failed to meet its burden of proof. Google's responses to Plaintiff's First Interrogatories are deficient; in most instances, Google has failed to respond entirely. A true and correct copy of Google's Interrogatory Answers is attached to this Memorandum as Exhibit "D." Each Interrogatory as to which Plaintiff believes a further response is required is addressed separately below, as required by Local Rule 37.1(A)(2) through (5).

A. Interrogatory No. 1

Please identify the name, address and telephone number of all persons who have knowledge or information of the claims set forth in Plaintiff's Complaint. For each such person, describe the knowledge or information which he/she has and what documents evidence, reflect or relate to such knowledge or information.

Google's Objection to Interrogatory No. 1

Google objects to the interrogatory to the extent that it seeks the disclosure of information protected by attorney-client and work product privileges. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, particularly with respect to the phrase "all persons who have knowledge or information." Google further objects insofar as no person or persons can be identified because no alleged wrongdoing or other conduct occurred.

Google objects to Interrogatory No. 1 on several grounds, including one which asserts that Google has no obligation to make *any* substantive response. Yet, the information requested corresponds to information which Google is obligated to provide, at least in part, in response to Local Rule 26.1. (*See* Initial Disclosure No. 5, requiring that Defendant provide the name and, if known, the address and telephone number of each individual likely to have discoverable information which Defendant may use to support

its claims or defenses.). Google's other objections, based on the timing and sequencing of discovery responses, are, as noted, now moot. Plaintiff made a full disclosure of his concepts and ideas in his discovery responses of June 20, 2008. Interrogatory No. 1 seeks the most basic form of discovery information – a listing of persons having knowledge and information. Google should provide the information requested in Interrogatory No. 1.

B. Interrogatory No. 2

Please identify the name, address, and telephone number of all persons who have knowledge or information respecting any defense which either Defendant or their affiliates may have to the claims set forth in Plaintiff's Complaint. For each such person, describe the knowledge or information which he/she has and what documents evidence, reflect or relate to such knowledge or information.

Google's Objection to Interrogatory No. 2

Google objects to this interrogatory as vague and ambiguous, particularly with respect to the words "respecting" and "affiliates." Google further objects to the extent that this request seeks the disclosure of information protected by attorney-client and work product privileges. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, particularly with respect to the phrase "all persons who have knowledge or information."

Google offers objections identical to those advanced in response to Interrogatory No. 1. The information sought in Interrogatory No. 2 corresponds *precisely* to that information which Google is obligated to provide in response to Local Rules 26.1. (*See* Initial Disclosure No. 5, requiring that Defendant provide the name and, if known, the address and telephone number of each individual likely to have discoverable information which Defendant may use to support its claims or defenses.).

Google also objects to Interrogatory No. 2 as overly broad and unduly burdensome. This objection is without merit; Google must do more than simply intone that the Interrogatory is burdensome, oppressive, or overly broad before a court will narrow overbroad discovery. *Williams v. Art Inst., 2006 U.S. Dist. LEXIS 62585 (N.D. Ga. Sept. 1, 2006)*. The objecting party must show specifically how each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *Id.* Similarly, "the party resisting production bears the responsibility of establishing undue burden." *PharMerica, Inc. v. HealthPrime, Inc., 2008 U.S. Dist. LEXIS 22197 (N.D. Ga. Mar. 19, 2008)* Google has made no such showing.

C. <u>Interrogatory No. 5</u>

Please identify all persons whom Defendants contend were engaged in the development of the Sky in Google Earth program, including but not

limited to the Google Pittsburgh engineering team and members of the Google Visiting Faculty Program from the University of Washington. For each person so identified, please state (a) their name, address and affiliation, (b) their academic, scientific and/or vocational competencies and credentials as they relate to the development of the Sky in Google Earth program, (c) their role in the Sky in Google Earth program, (d) the work and developments which each such person was responsible for performing, and (e) all documents which each person created, drafted, edited, reviewed or assembled while working on the Sky in Google Earth program initiative.

Google's Objection to Interrogatory No. 5

Google objects to this interrogatory as vague and ambiguous, particularly with respect to the words "engaged" and "development." Google further objects to the extent that this request seeks the disclosure of information protected by attorney-client and work product privileges. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, particularly with respect to the phrase "all persons who have knowledge or information."

Google again offers objections identical to those advanced in response to Interrogatory No. 1. The information requested is required of all parties litigating cases in the United States District Court for the Northern District of Georgia. (Local Rule 26.1). The persons referenced in Interrogatory No. 5 will have information relevant to the parties' claims and defenses in the case. Public statements offered by Google concerning its Sky in Google Earth

program have specifically referenced the work of the Google Pittsburgh engineering team and the Visiting Faculty Program from the University of Washington. Google is requested to respond to Interrogatory No. 5 completely.

A party is entitled to discovery of any non-privileged matter that is relevant to any party's claim or defense. A piece of evidence is relevant if it has "any tendency to make the existence of any *fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Kipperman v. Onex Corp., 2008 U.S. Dist. LEXIS 34519 (N.D. Ga. Apr. 25, 2008).* As to Plaintiff's request that Google specify documents which each person created, drafted or reviewed, Plaintiff is entitled to know and understand this information as he seeks to investigate Google's independent creation defense.

D. Interrogatory No. 10.

Please identify all persons employed by Defendant Google, Inc. who were informed of and following information and details generated by the e-mail discussion group initiated by Plaintiff and referred to as "googlesky@googlegroups.com."

Google's Objection to Interrogatory No. 10

Google objects to this request as vague and ambiguous, particularly with respect to the phrase "informed of" and the words "following" and "details." Google further objects to the extent that this request seeks the disclosure of information protected by attorney-client and work product

privileges. Google further objects on the grounds that the interrogatory is overbroad because it is limitless with respect to time.

Google asserts that Interrogatory No. 10 is vague and ambiguous. Merely stating that a discovery request is vague or ambiguous, without specifically stating how it is so, is not a legitimate objection to discovery. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007).* Interrogatory No. 10 plainly seeks the identity of all persons who were informed of, or who were following, the information and details being generated by members of Plaintiff's e-mail discussion group. Importantly, the identity of these individuals is subject to disclosure by Defendant in Initial Disclosure No. 5 (requiring Defendant to provide the name and, if known, the address and telephone number of each individual likely to have discoverable information which Defendant may use to support its claims or defenses). Plaintiff disclosed details concerning his Prior Invention identified as "Google Sky" through the Google e-mail discussion group which he established. Thus, the information sought in Interrogatory No. 10 is reasonably calculated to lead to the discovery of admissible evidence respecting Plaintiff's claims of misappropriation and fraudulent conspiracy.

Google also objects to Interrogatory No. 10 on grounds that it is unlimited as to time. It is unquestioned that Plaintiff established his Google

discussion group in January 2006. Interrogatory No. 10 is thus reasonably limited as to time.

As to Google's assertion that Interrogatory No. 10 seeks the disclosure of information protected by the attorney-client privilege and work product exclusion, it does not. Moreover, a party asserting the attorney-client privilege or the work product doctrine bears the burden of establishing a factual basis for its assertions. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007).* In order to invoke the attorney-client privilege, a claimant must establish: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *Id. at 697.* As for the work product doctrine, it applies to documents and other items prepared by a party or its representative in "anticipation of litigation."

Fed.R.Civ.P. 26(b)(3). The information requested in Interrogatory No. 10 was neither prepared nor secured in anticipation of litigation.

E. Interrogatory No. 11.

Please identify all persons employed by Defendant Google, Inc. who were responsible for the creation, administration, execution, or management of Company e-mail discussion groups since January 1, 2000.

Google's Objection to Interrogatory No. 11

Google objects to this interrogatory as vague and ambiguous with respect to the phrases "responsible for the creation, administration, execution, or management of" and Company e-mail discussion groups." Google further objects that this interrogatory is overbroad and unduly burdensome with respect to time and scope. Google further objects that this interrogatory seeks information that is neither relevant to any party's claim or defense nor reasonably calculated to lead to the discovery of admissible evidence. Google further objects to the extent that this interrogatory seeks the disclosure of information protected by the attorney-client and work product privileges.

As noted, merely asserting a discovery request is vague or ambiguous, without specifically stating how it is so, does not constitute a valid objection. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007).* Interrogatory No. 11 plainly seeks the identity of all persons who were involved in the creation, administration, execution, or management of Google's e-mail discussion groups. These individuals are subject to disclosure in Defendant's Initial Disclosure No. 5.

Google also contends that the information sought is not relevant. A piece of evidence is relevant if it has "any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Kipperman v. Onex Corp., 2008 U.S. Dist. LEXIS 34519 (N.D. Ga. Apr. 25, 2008).* As noted, Plaintiff made disclosure of his Prior Invention through the private Google discussion group which he established in January 2006 and which he convened once his employment was commenced in the following month. Plaintiff alleges that Google misappropriated his concepts and ideas related to Google Sky. Knowing the identity of those Google employees responsible for administering or managing the company's e-mail discussion groups, or monitoring them, is unquestionably relevant to an investigation of Plaintiff's claims of misappropriation.

Google also asserts that the information is protected by the attorney-client privilege and the work product exclusion. Attorney-client or work product information must be specifically raised and demonstrated, providing a factual basis for the assertion. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007).*

Notably, Google does not assert that the number of individuals potentially encompassed by Interrogatory No. 11 is unduly large. That Plaintiff has requested information concerning persons employed since January 1, 2000 is not alone evidence that Interrogatory No. 11 is

oppressive. Even so, Plaintiff has previously offered to limit Interrogatory No. 11 to those persons responsible for the creation, administration, execution or management of Defendant's e-mail discussion groups from the date of the group's establishment going forward, or January 1, 2006 to the present. (*See* Exhibit "A" hereto).

F. Interrogatory No. 15.

With respect to the Sky in Google Earth program as implemented, please identify: (a) all program features; (b)all program layers; (c)all program steering mechanisms and attributes; (d)all third-party providers of mapping, scientific or astrological data; and (e) all third-party providers of program imagery and software programming.

Google's Objection to Interrogatory No. 15

Google objects to this interrogatory as vague and ambiguous particularly with respect to the phrases "implemented," "features," "layers," " steering mechanisms," " attributes," and " program imagery." Google further objects that this interrogatory is overbroad and unduly burdensome with respect to time and scope. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad, particularly with respect to the phrase "all" which precedes each of the five requested topics. Google further objects to the extent that this interrogatory seeks the disclosure of information protected by the attorney-client and work product privileges. Google states that the information responsive to this interrogatory is available to Plaintiff by accessing Google Sky itself.

Google objects to Interrogatory No. 15 with the same objections used in responding to Interrogatories 1, 2 and 5. Google must do more than simply intone that the interrogatories are "burdensome, oppressive or overly broad." *Williams v. Art Inst., 2006 U.S. Dist. LEXIS 62585 (N.D. Ga. Sept. 1, 2006)*. Furthermore, a detailed description of program features which Google attributes to its Google Sky program is entirely relevant to an investigation of Plaintiff's claims of misappropriation, as well as Google's defenses. Likewise relevant is a description of any third-party contributors to the technology.

Google's objections based on the timing and sequencing of discovery responses have been rendered moot. As for the attorney–client and work product objections advanced by Google, these require that the subject information have remained in confidence. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007)*. Google states that the response to Interrogatory No. 15 is publicly available. Google's objections are without merit.

IV. Plaintiff's First Continuing Request For The Production Of Documents And Things.

Google has objected to the majority of Plaintiff's First Requests for the production of documents and things. A true and correct copy of Google's Response to Plaintiff's First Requests is attached to this Memorandum as Exhibit "E." Each Request to which Plaintiff believes a further response is required is discussed separately below.

A. Request No. 1

All documents and things evidencing, reflecting or relating to the development of the Sky in Google Earth program by Google, Inc."

Google's Response to Request No. 1

Google objects to this request as vague and ambiguous, particularly with respect to the phrase "evidencing, reflecting or relating to," and the word " development." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges. Google further objects to the extent that this request seeks the production of trade secrets or other confidential information. Google further states that such information and material should not be disclosed, if at all, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, as it potentially calls for the search, review, and production of a vast number of documents that are irrelevant to plaintiff's alleged concepts and ideas.

Google objects to Request No. 1 with the same basic objection offered in response to Plaintiff's Interrogatories 1, 2 and 5. The Court's Initial Disclosures required Google to provide a copy of, or to describe by category and location, all documents, data compilations, and tangible things in its possession, custody or control that it may use to support its defenses. Google has belatedly done so with its Initial Disclosures of August 1, 2008, but its descriptions of documents are patently skeletal. No detail or specificity of any kind has been supplied. Now, under Plaintiff's discovery Request No. 1, Google is being asked to provide documents pertaining to its Sky in Google Earth program. As noted, Plaintiff voluntarily agreed, on pages 6-8 of its July 11, 2008 letter to Google's counsel (Exhibit "A" hereto), initially to receive a subset of the requested documents.

Plaintiff's offered subset focuses on documents which are pertinent to any sophisticated software development process: (a) Business Case documents and materials; (b) Product Feasibility documents and materials; (c) Product Planning Documents; (d) Product Requirements Analysis documents; (e) Product Design documents; (f) Product Roadmap documents; and (g) Development Calendar documents. Also, meeting minutes related to each of the foregoing documents or their equivalent are important, as are meeting minutes evidencing the execution of tasks addressed or implicated

by each document. Also appropriate for production are documents evidencing information conceived, detailed, suggested or proposed by Plaintiff, whether or not that information came directly from Plaintiff or from others who communicated Plaintiff's information to Google-tasked software designers, engineers or programmers.

The names of the documents which Plaintiff has suggested may or may not correspond to the nomenclature which Google employs. Even so, with the Court's oversight, Google should be instructed to produce the functional equivalents to these documents as an initial fulfillment of Google's obligations respecting Request No. 1. If at a later time it is determined that a more complete production is necessary, extending to all engineering and coding documents, as well as meeting minutes related to that further work, Plaintiff could request that that production be made. If a dispute ensued and could not be resolved, objections could ultimately be addressed to the Court.

Plaintiff's counsel noted in his July 11, 2008 proposal to Google that Google may employ Agile/Scrum design/development methodologies. Documents and materials evidencing Sky in Google Earth's product planning, its requirements analysis, and its design (including communication

and meeting minutes related to these iterative Agile/Scrum processes) should be part of this initial production.

Google's remaining objections are improper. As noted, objections respecting the timing and sequencing of discovery have been rendered moot.

B. Request No. 2

All contract documents and things evidencing, reflecting or relating to Defendant Google, Inc.'s business relationship with Defendant WorkforceLogic USA.

Google's Response to Request No. 2

Google objects to this request as vague and ambiguous, particularly with respect to the phrase "evidencing, reflecting or relating to," and "business relationship." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges. Google further objects on the grounds that this request seeks the production of material that is neither relevant to any party's claim or defense nor reasonably calculated to lead to the discovery of admissible evidence. Google further objects that the request is overbroad and unduly burdensome and expensive, as it potentially calls for the search, review, and production of a vast number of documents that are irrelevant to plaintiff's claims.

Google objects to Request No. 2 on grounds that it is vague, ambiguous and burdensome. Objections such as these cannot be established by blanket statements. *See Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007)*. As for the attorney-client and work production objections, documents prepared in the regular course of business are not prepared in anticipation of litigation and are not immunized from discovery

merely by characterizing them as work product or attorney-client communications. *Chaney v. Slack, 99 F.R.D. 531, 533 (S.D. Ga. 1983).* Google must make the necessary showing.

Plaintiff here seeks documents bearing on the relationship existing between WorkforceLogic and Google, Inc. WorkforceLogic is the entity which hired Plaintiff on Google's behalf. Documents evidencing how it was that WorkforceLogic could recruit, interview, hire, or terminate temporary employees assigned to Google, Inc. are relevant to an evaluation of the legal documents which Plaintiff signed at the time he made application for employment. Plaintiff's interest in this documentation pertains to that period of time during which Plaintiff completed and signed his application papers – February 2006.

C. Request No. 6

All documents and things evidencing, reflecting or relating to the Google, Inc. e-mail discussion group googlesky@googlegroups.com.

Google's Response to Request No. 6

Google objects to this request as vague and ambiguous with respect to the phrases "evidencing, reflecting or relating to" and "Google, Inc. email discussion group." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges.

Google calls Request No. 6 vague and ambiguous for including the phrases "evidencing, reflecting or relating to" and "Google, Inc. e-mail discussion group." Google does not demonstrate how this is so.

Notably, Google made a partial production of documents in response to Request No. 6 while announcing its right to "supplement this response." Request No. 6 is not vague, as the e-mail discussion group in question is well-understood by all concerned. Plaintiff has identified the group's members and provided copies of the members' e-mail exchanges in his own discovery responses to Google. Thus, Google should meet its discovery obligations under Rules 26 and 33 and produce all responsive documents and material.

Google asserts that the Request seeks information and documents protected by the attorney-client privilege and work product exclusion. But it clearly does not. Even so, a party asserting the attorney-client privilege or the work product doctrine must provide a factual basis for its assertions. *Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 698 (N.D. Ga. 2007).* Google has not done so.

As for the work product doctrine, it applies to documents and other items prepared by a party or its representative in "anticipation of litigation."

Fed.R.Civ.P. 26(b)(3). The information requested in Request No. 6 was neither prepared nor secured with the prospect of litigation in mind.

D. Request No. 7.

All documents and things evidencing, reflecting or relating to Plaintiff's initiation of a Google, Inc. e-mail discussion group googlesky@googlegroups.com.

Google's Response to Request No. 7.

Google objects to this request as vague and ambiguous with respect to the phrases "evidencing, reflecting or relating to," "Plaintiff's initiation," and "Google, Inc. email discussion group." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges.

Google employs the same formulaic objections used in response to Request No. 6. They are without merit.

E. Request No. 8

All documents and things evidencing, reflecting or relating to Google, Inc.'s observation, monitoring, surveillance, receipt, consideration, evaluation, sharing or evaluation of the concepts, ideas, discussions and initiatives presented, advanced or discussed in the Google, Inc. e-mail discussion group googlesky@googlegroups.com.

Google's Response to Request No. 8

Google objects to this request as vague and ambiguous with respect to the phrases "evidencing, reflecting or relating to," "observation, monitoring, surveillance, receipt, consideration, evaluation, sharing or evaluation, "and "Google, Inc. email discussion group." Google further objects to the extent that this request seeks the production of material protected by attorney-client and work product privileges.

Google employs the same objections in response to Request No. 8 as are given in response to Requests 6 and 7. Assertions of vagueness and ambiguity as used here are but transparent excuses to avoid discovery. Plaintiff has filed a claim of misappropriation. Plaintiff made disclosures of his concepts and ideas to what was supposed to be a private Google e-mail discussion group. A request for documents demonstrating any observation, monitoring or surveillance of that group's work is reasonably calculated to lead to the discovery of admissible evidence on issues of misappropriation.

F. Request No. 11

All documents and things evidencing, reflecting or relating to the work of the Google Pittsburgh engineering group in developing, advancing or refining the Sky in Google Earth program or any part thereof."

Google's Response to Request No. 11

Google objects to this request as vague and ambiguous, particularly with respect to the phrases "evidencing, reflecting or relating to" and " developing, advancing or refining," and to the word " work." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges. Google further objects to the extent that this request seeks the production of trade secrets or other confidential information. Google further states that such information and material should not be disclosed, if at all, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential

information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, as it potentially calls for the search, review, and production of a vast number of documents that are irrelevant to plaintiff's alleged concepts and ideas.

Google claims that Request No. 11 is vague and ambiguous, "particularly with respect to the phrases 'evidencing, reflecting or relating to' and 'developing, advancing or refining,' and the word 'work.'" These objections are frivolous and obstructive. Other objections identical to those offered in response to Plaintiff's Interrogatories 1, 2 and 5 as well as Plaintiff's document Request No. 1 are equally without merit. Plaintiff's further disclosures of June 20, 2008 have rendered moot any objections having to do with the timing and sequencing of discovery. Moreover, the product design documents, product requirements documents, and other documents described in Plaintiff's suggested response to Request No. 1 are ones which Google can immediately produce, both in response to Request No. 11 and Request No. 12. The Court is asked to order that Google do so.

G. <u>Request No. 12</u>

All documents and things evidencing, reflecting or relating to the work of the representatives of the University of Washington in the Google Visiting Faculty Program in developing, advancing or refining the Sky in Google Earth program or any part thereof.

Google's Response to Request No. 12

Google objects to this request as vague and ambiguous, particularly with respect to the phrases "evidencing, reflecting or relating to" and " developing, advancing or refining," and to the word " work." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges. Google further objects to the extent that this request seeks the production of trade secrets or other confidential information. Google further states that such information and material should not be disclosed, if at all, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further objects on the grounds that it is unable to determine whether the request seeks relevant information, or is reasonably calculated to lead to the discovery of admissible evidence, until plaintiff identifies with reasonable particularity the concepts or ideas he alleges were misappropriated by Google. Google further states that it should not be required to identify persons requested by this interrogatory, nor should it be required to disclose any trade secrets or other confidential information, if at all, until plaintiff establishes that the pretrial disclosure is warranted. Google further objects that the request is overbroad and unduly burdensome and expensive, as it potentially calls for the search, review, and production of a vast number of documents that are irrelevant to plaintiff's alleged concepts and ideas.

Google's objections to Request No. 12 mirror those given by it in response to Request No. 11. For the reasons previously noted, Google's objections are frivolous, obstructive and now moot.

H. Request No. 15

All documents and things evidencing, reflecting or relating to corporate mottos, mission statements and statements of philosophy of Defendant Google, Inc.

Google's Response to Request No. 15

Google objects to this request as vague and ambiguous, particularly with respect to the phrases " evidencing, reflecting or relating to" and

" statements and philosophies." Google further objects to the extent that this request seeks the production of material protected by the attorney-client and work product privileges. Google further objects on the grounds that this request seeks the production of material that is neither relevant to any party's claim or defense nor reasonably calculated to lead to the discovery of admissible evidence.

Google claims that Request No. 15 is vague for using the words "evidencing, reflecting or relating" and "statements of philosophy." Merely stating that a discovery request is vague or ambiguous, without specifically stating how it is so, is not a legitimate objection. Objections must be sufficiently plain and specific to allow an understanding of precisely how the challenged discovery requests are alleged to be objectionable. *Williams v. Taser Int'l, Inc., 2007 U.S. Dist. LEXIS 40280 (N.D. Ga. June 4, 2007).*

Google further objects on grounds that the material is not relevant. Evidence is relevant if it has "any tendency to make the existence of any *fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Kipperman v. Onex Corp., 2008 U.S. Dist. LEXIS 34519 (N.D. Ga. Apr. 25, 2008).* Plaintiff has informed Defendant that he was required to view a training video when commencing his assigned work at Google, Inc. (*See* Plaintiff's Answers to Defendant Google, Inc.'s First Interrogatories, Answer No. 13). In that video, Google's philosophy and its policies regarding how employees can allocate their own work time to innovative projects was specifically

addressed. Because Plaintiff made disclosure of his Prior Invention through the private Google e-mail discussion group previously mentioned and did so at least partially in response to the Company's policy of encouraging innovative concepts and ideas, the production of corporate mottos (e.g., "Do No Evil," one which is publicly attributed to Google) as well as mission statements and statements of Company philosophy are directly relevant to Plaintiff's claims of misappropriation.

CONCLUSION

Rule 37 provides that "an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." Fed.R.Civ.P. 37(a)(3). Google should be required to respond fully and without further delay or excuse respecting:

(1) the Court's mandatory Initial Disclosures;

(2) Plaintiff's First Interrogatories; and

(3) Plaintiff's First Requests For Production Of Documents.

Plaintiff has incurred reasonable attorneys' fees and expenses of litigation in bringing his Motion To Compel. Plaintiff respectfully moves the Court to award him such fees and costs. At the direction of the Court, Plaintiff will itemize those fees and costs in detail.

Respectfully submitted,

/s/ Michael Alan Dailey
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FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JONATHAN COBB,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION FILE
	:	NUMBER 1:08-CV-0483-MHS
GOOGLE, INC.; and	:	
WORKFORCELOGIC USA;	:	
	:	
Defendants.	:	

CERTIFICATION OF COMPLIANCE WITH RULE 37(a)(2)(A)

Plaintiff's Counsel certifies that he has tried, repeatedly and in good faith, to reach an accommodation with Google regarding the discovery requests at issue. The parties began discussions of these matters in early June 2008. Correspondence, e-mails and telephone discussions have ensued. Despite an agreement by the parties that responses to Initial Disclosures would be provided with the parties' discovery responses of June 20, 2008, Google completely ignored and breached this agreement. Only after counsel's letter of July 11, 2008, specifying the complete failure to provide Initial Disclosures was received, did Google move to provide any Initial

Disclosures. Even then, Google has followed its own schedule and its own interpretation as to the timing and scope of its responses.

Further discussions aimed at addressing the adequacy of Google's responses to Plaintiff's discovery requests have met without success.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
WITH REQUIRED FONT SIZE

Plaintiff certifies that this Memorandum has been prepared using Times New Roman typeface, 14 point font size.

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