IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERICH SPECHT, et al.	)	
	)	C.A. No. 09-cv-2572
Plaintiffs,	)	
	)	Judge Leinenweber
v.	)	
	)	Magistrate Judge Cole
GOOGLE INC.,	)	
	)	
Defendant.	)	

GOOGLE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL AND FOR SANCTIONS RELATING TO THE DEPOSITION OF MARTIN MURPHY

Defendants' response to Google's Motion to Compel and for Sanctions Relating to the Deposition of Martin Murphy is long on accusations, but woefully short on substance. Instead, Plaintiffs respond in their typical tit-for-tat fashion, demanding "sanctions" and a "protective order," without ever providing a basis for either.[1]

Nearly every page of Mr. Murphy's deposition transcript contains either a speaking objection by Mr. Fleming, or a claim of privilege with respect to materials that clearly cannot be privileged. In its Motion, Google seeks a new deposition of Mr. Murphy on three particular subjects, document production from Mr. Murphy, and (to address opposing counsel's inexcusable behavior) sanctions directed to Plaintiffs' counsel. Unable or unwilling to defend counsel's inappropriate objections, Plaintiffs incredibly argue the ***merits*** of his admittedly improper speaking objections. And, as a response in support of Mr. Fleming's and Mr. Murphy's inappropriate claims of privilege, Plaintiffs simply repeat the meritless arguments that Mr. Fleming presented at Mr. Murphy's deposition.

The Court should take note that Plaintiffs do not have a substantive response to Google's Motion, and enter the requested sanctions accordingly.

[1] Because Plaintiffs have not set forth the factual and legal basis necessary for the relief they seek, their cross-motion is inadequate and must be denied.

I. Mr. Fleming And Mr. Murphy Frustrated Discovery.

Plaintiffs' argument that Google got "full discovery" from Mr. Murphy is ridiculous. When questioned about his statements to the press, Mr. Murphy developed sudden amnesia as to what he had told the press -- amnesia so severe he could not even verify whether quotes attributed to him were accurate. Indeed, Mr. Murphy's litigation-induced amnesia reduced him to providing nonsense:

> Q. My question is, in reading the article, does anything strike you -- do you react in any way to any of these quotes? Does anything strike you as untrue or a misquote of what you said?
>
> [Speaking objection omitted]
>
> Q. Can you answer my question, sir?
>
> A. I can't answer that question, no.
>
> [Speaking objection omitted]
>
> Q. So because you don't recall the conversation, nothing in this article strikes you as a misquote of what you said, is that correct?
>
> A. That's not my answer.

(Murphy Dep., 138:24-139:17, *et seq*.) Then, Google's counsel simply asked Mr. Murphy if the quotes attributed to him in the Forbes.com article were accurate. (Murphy Dep., pp. 145-154.) Mr. Fleming prevented cross-examination on the basis that it would call for privileged or work product information -- ***despite the fact that these statements were made to a third party witness in the media***.

Statements to third parties are obviously not privileged. While Plaintiffs try to characterize this questioning as an invasion of Mr. Murphy's efforts to prepare the Complaint in this case, it is not. Mr. Murphy made public statements to the media, which statements form a part of the basis of Google's counterclaims, and Google is entitled to inquire as to the factual basis for those statements. Google is similarly entitled to cross-examine Mr. Murphy if the testimony he offers is not credible; for example, Mr. Murphy cannot seriously contend that he was not aware of the 2004 dissolution of Android Data Corporation given that he attached proof of dissolution to his Complaint. Any overlap this testimony might have with Mr. Murphy's efforts to prepare the Complaint is purely incidental, and does not bar

further discovery into the matter. Mr. Murphy chose to make these public statements, either with or without Plaintiffs' authorization, and cannot now hide behind alleged "privilege" to avoid questions about them. Moreover, Mr. Murphy's public statements appear to be part of Plaintiffs' ongoing scheme to defraud the USPTO by falsely claiming use of the "Android Data" mark. As a result, even if the public nature of Mr. Murphy's statements does not render the basis for those statements discoverable, the crime-fraud exception to the attorney-client privilege does.

II. Plaintiffs Abused Speaking Objections And Meritless Claims Of Privilege To Frustrate Discovery.

Mr. Murphy's deposition transcript readily demonstrates that Plaintiffs used both inappropriate speaking objections as well as meritless claims of privilege to prevent any questioning about Mr. Murphy's false statements to the press and his actions in furtherance of Plaintiffs' scheme to fraudulently claim use of the "Android Data" mark.[2]

Plaintiffs do not dispute that speaking objections are inappropriate, and do not even dispute that Mr. Fleming made numerous speaking objections. Instead, inexplicably, Plaintiffs attempt to argue the ***merits*** of Mr. Fleming's speaking objections.[3] Plaintiffs attempt to justify Mr. Fleming's speaking objections, note-passing, and taking breaks during questions, but those attempts to justify Mr. Fleming's actions merely prove Mr. Fleming's inappropriate behavior. Google is confident that a review of the transcript reveals that Mr. Fleming's behavior is plainly indefensible behavior, and that no further argument is necessary.

Nonetheless, there are two points worth noting. First, Plaintiffs argue that Mr. Fleming is entitled to confer with this client. While that may be true, such conversations are then clearly discoverable under Federal Rule of Evidence 612. While Mr. Murphy testified that the note did not address the questions

[2] Plaintiffs attempt to excuse their actions by providing information after the deposition or by offering to answer written questions, only further confirms that counsel's actions during the deposition were improper. However, Google is entitled to an oral deposition where Mr. Murphy provides factual information under oath and where Google can raise follow-up questions based upon those answers. Despite Plaintiffs' desire to the contrary, it is not a take home test where Plaintiffs and Mr. Murphy may respond at their leisure.

[3] While Google pointed out that Plaintiffs' speaking objections were too numerous to address individually, Plaintiffs ignored this argument and responded only to the specific examples listed by Google.

being asked and then moments later refused to testify as to the contents (p. 130-131), F.R.E. 612 specifically contemplates that the witness might deny that a writing actually refreshed his memory:

> If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

F.R.E. 612. No doubt Mr. Fleming, being the experienced attorney that he is, knows full well that such conferences and writings in the middle of questioning are discoverable. Yet, he inexplicably refused to ***even preserve the note for the Court's inspection***.[4] The other point worth noting is that Plaintiffs have not even attempted to defend Mr. Fleming's speaking objections during questioning of Mr. Murphy regarding his conversations with Ms. Woyke.

Further, Plaintiffs did not rely solely on inappropriate speaking objections to frustrate discovery. Mr. Fleming and Mr. Murphy also relied heavily on inappropriate claims of privilege. Once again, the instances of inappropriate claims of privilege are too numerous to list. Despite attempting to justify their actions by responding to the limited examples listed by Google, Plaintiffs fail to address the actual issue, namely that the areas of testimony that Google seeks in the renewed deposition of Mr. Murphy are not privileged. Mr. Murphy's bias and financial interest in the case, the factual basis for his statements to the media, and his document production in response to the subpoena served upon him are all simply not privileged and never should have been claimed as such. That these areas are not privileged should be so obvious that further discussion is likely not necessary.

However, Plaintiff's transparent attempts to recast Google's questions as directed to different subjects notwithstanding, Mr. Murphy's financial interest in this case is clearly not privileged. In fact, the very case relied upon by Plaintiffs[5] concedes that fee arrangements are not subject to the attorney-client privilege. Nor are Mr. Murphy's statements to the media -- or his factual basis for those statements --

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[4] Plaintiffs explanation for Mr. Fleming's note passing by claiming that opposing counsel was attempting to intercept his oral instructions by "intently" staring at him across the table, while creative is irrelevant. Regardless of the creative excuse, Google's counsel at the deposition has no training in lip reading.

[5] *Piazza v. First American Title Ins. Co*., No. 3:06-cv-765AWT, 2007 WL 4287649, at *2 (D. Conn. Dec. 5 2007) (noting fee agreement admittedly not privileged but not relevant to discovery which had been limited to the issue of class certification).

conceivably privileged. And while Plaintiffs have provided a declaration from someone other than Mr. Murphy addressing some questions raised by Google regarding Mr. Murphy's document production, other questions are left unanswered.

Plaintiffs have made significant efforts to misstate Google's questions or to take them out of context, but Plaintiffs' assertions of privilege must be viewed in the context of the line of questioning in which they arose. For example, Google asked Mr. Murphy if Plaintiffs ever provided "customer software solutions" to Village Realty & Investments. Only after Mr. Murphy claimed not to know what "custom software solutions" means did Google point out that Mr. Murphy himself had coined the phrase when drafting Plaintiffs' interrogatory responses. (Murphy Dep., pp. 110-119.)

Likewise, on the subject of Mr. Murphy's public statements, it was only after Mr. Murphy refused to answer questions (based on an inappropriate claim of privilege) that Google confronted him with publicly available documents he himself filed. For example, when asked to confirm that he was aware that Android Data Corporation had been dissolved at the time the case was filed, Mr. Murphy refused to answer on the basis of privilege. (Murphy Dep. p. 165.) Google then confronted Mr. Murphy with his own documents and faxes to the Secretary of State. (Murphy Dep., pp. 166-175.) Google was not inquiring into confidential work product, but was instead confronting Mr. Murphy with publicly available documents -- documents which apparently came from his own files. Google also confronted Mr. Murphy with the Complaint that he drafted and filed, which included as exhibits additional publicly available documents confirming the 2004 involuntary dissolution of Android Data Corporation. (Murphy Dep., pp. 176-187.) All of these questions were raised in the context of to Mr. Murphy's knowledge that the statements he made to the media are false, and particularly in an attempt to get Mr. Murphy to admit even the most basic of non-privileged facts. Mr. Murphy steadfastly refused. (Murphy Dep., p. 187.)

III. Plaintiffs Have Failed To Provide A Grounds For Their "Cross-Motion."

Plaintiffs fail to address the issues raised by Google's Motion and instead rely upon their mantra that everything must be "reciprocal." As such, Plaintiffs have "responded" to Google's Motion to Compel and for Sanctions with their own "cross-motion" for sanctions, as well as a "cross-motion" seeking a

protective order.[6] But any motion, even "a cross-motion" must "state with particularity the grounds for seeking the order." Fed.R.Civ.P. 7(b)(1)(B). Plaintiffs' "cross-motion" and memorandum in support of their "cross-motion" alleges "harassing" behavior by counsel, but does not specifically identify any, and does not specify any legal grounds in support of their so-called "cross-motion." Because Plaintiffs have failed to set forth the grounds for their "cross-motion," it must be denied.[7]

Though Plaintiffs' brief is replete with loaded words like "offensive," "demeaning" and "petty harassment," these words bear no resemblance to Google's counsel's actions during Mr. Murphy's deposition. Google is confident that, on review of Mr. Murphy's deposition transcript, the Court will agree that there was no such behavior by Google during Mr. Murphy's deposition. Repeating a baseless allegation does not make it true.[8]

Rather, Plaintiffs have taken the position that the mere act of deposing an attorney is an act of "harassment." Not more than five minutes into Mr. Murphy's deposition, Mr. Fleming was already lodging baseless accusations of "harassment"[9] (at page 14) -- after himself having raised an assault of five speaking objections, including one that expressly told the witness "how" to answer.[10] Plaintiffs' cross-motion is nothing more than an excuse to get the "last word" without requesting a surreply.

IV. Mr. Murphy's Status As An Attorney Is Irrelevant.

Plaintiffs make much of Mr. Murphy's status of an attorney, but that fact is hardly relevant to Google's motion. Indeed, at no time prior to Mr. Murphy's deposition, did Plaintiffs ever object to the deposition proceeding. Moreover, even Plaintiffs agree that Mr. Murphy's statements to the press and Mr. Murphy's knowledge of and relationship between one of his businesses and Plaintiffs are relevant

[6] As is blatantly obvious, Plaintiffs hope to defray the damage done by their own misbehavior by accusing Google and its counsel of the same behavior.

[7] By Plaintiffs own admission, any attempt to support their allegations by raising new facts or law in their "reply" is inappropriate.

[8] Of course, the Court is already aware of Plaintiffs' tendency, whenever faced with a motion to compel, to accuse Google of engaging in the same behavior. The Court is likewise already aware of Plaintiffs' tendency to fail to substantiate those allegations. This "cross-motion" is just more of the same.

[9] Plaintiffs never explicitly state what exactly they claim constitutes harassment.

[10] In one of the objections, Mr. Fleming objected "**That's the answer you give** because you're not going to give any testimony as to whether you are or are not a relevant fact witness. And you're not going to give any testimony as to whether anybody else is a relevant fact witness. That falls within work product protection, okay?" (p 13-14, emphasis added).

topics of inquiry. Because the parties agree that discovery and the deposition of Mr. Murphy is appropriate, Plaintiffs' concern and reliance on cases that discuss whether an attorney should be deposed in the first place is misplaced.

Plaintiffs' failure to raise these issues **before** Mr. Murphy's deposition is also telling. If Mr. Murphy being an attorney was at all relevant to whether his deposition being taken was proper, Plaintiffs would have approached the Court ***before*** Mr. Murphy's deposition ever took place. Despite their criticism that "Google chose to depose Plaintiffs' attorney first,"[11] Plaintiffs took no action to prevent or even delay the deposition. Mr. Murphy's knowingly false statements to the press are an important element of Google's counterclaims, and it is not surprising that he would be deposed first. Indeed, doing so prevents complications with his representation of other fact witnesses. And Plaintiffs' own counsel agreed that would be a relevant topic for inquiry at the very beginning of the deposition.

V. Conclusion

Mr. Murphy's deposition transcript speaks for itself. Plaintiffs grossly abused the Federal Rules during Mr. Murphy's deposition, and Google has requested narrowly tailored relief to address that behavior. The Court should grant that relief (as well as any other relief the Court deems appropriate and just), and should deny Plaintiffs' unsupported cross-motions.

Respectfully submitted,

Dated: June 2, 2010

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CERTIFICATE OF SERVICE

[11] Of course, that statement is also untrue as the first deposition that Google conducted was that of Kenneth Robblee -- a third party that substantiated "pre-litigation" facts that Mr. Murphy should have been aware of prior to filing the lawsuit and/or speaking to the press.

I hereby certify that on the date set forth below, I electronically filed the foregoing **GOOGLE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL AND FOR SANCTIONS RELATING TO THE DEPOSITION OF MARTIN MURPHY** with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: June 2, 2010 /Cameron M. Nelson/