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

ERICH SPECHT, an individual and doing business as ANDROID DATA CORPORATION, and THE ANDROID'S DUNGEON INCORPORATED,	)	
Plaintiffs-Counterdefendants,	)	Civil Action No. 09-cv-2572
v.	)	Judge Harry D. Leinenweber
GOOGLE INC.,	)	Magistrate Judge Jeffrey Cole
Defendant-Counterclaimant.	)	

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF THEIR CROSS-MOTION FOR A
PROTECTIVE ORDER AND FOR SANCTIONS AGAINST GOOGLE

Plaintiffs, Erich Specht, an individual and doing business as Android Data Corporation, and The Android's Dungeon Incorporated, by their attorneys, Novack and Macey LLP, respectfully submit this Reply Memorandum In Support of Their Cross-Motion For a Protective Order And For Sanctions Against Google.

I.

INTRODUCTION

There really isn't much to say in this Reply brief. After all, Google has once again chosen to ignore the relevant case law. Thus, Google has made no attempt to address the Shelton factors or explain why the Court should compel one of the attorneys of record in this case to sit for another deposition. In short, there has been no showing that the information sought from Mr. Murphy:

- is relevant and non-privileged;
- is crucial to the preparation of Google's case; and

- cannot be obtained by any other means.

Shelton v. American Motor Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). Yet, each of these factors has to be established in order for Google to be allowed to depose Mr. Murphy on any subject.

Google's latest brief fails to make the required Shelton showing. Instead, the brief makes various other arguments, none of which has any merit. Each will be addressed in turn.

II.

ARGUMENT

A. Google's Argument (at pp. 6-7) That Mr. Murphy's Status As An Attorney Is Irrelevant

Google's attempt to brush aside the Shelton factors and the significant body of case law from this district applying Shelton fails. Google is wrong when it says that Shelton does not apply because Plaintiffs did not object to the deposition proceeding. As Shelton itself demonstrates, a party need not move to quash nor otherwise object preemptively to the deposition of an attorney. Indeed, certain opinions from this district recognize that a party should not preemptively seek to prohibit such depositions from proceeding and that the proper approach is for the attorney/deponent to attend the deposition and raise objections in response to specific questions. Miyano Machinery USA, Inc. v. Miyanohiotec Machinery, Inc., 257 F.R.D. 456, 464 (N.D. ILL. 2008).

Here, this was the exact procedure demanded by Google and followed by Plaintiffs. Thus, at the outset of the deposition, when Plaintiffs' counsel cautioned Google as to the permissible scope of the examination, Google's counsel acknowledged that any disputes would be addressed "on a question-by-question basis as required under the law." (See Murphy Dep. at 6:3-6.)

Moreover, Google's contention that Shelton is inapplicable because Mr. Murphy has knowledge concerning his statements to the media and Plaintiffs' work with VRI is no more compelling. In Shelton, and in every case applying Shelton, there is arguably some relevant non-privileged testimony that the attorney can give. But that is not the issue. Google has to show that any other information it seeks (i.e., unrelated to the media or VRI) can be obtained only from the attorney/deponent and is crucial to the preparation of its case. And here, Google has simply made no such showing.

B. Google's Argument (at p. 2) That Mr. Murphy Refused To Disclose His Statements To The Media On Privilege Grounds

This argument is completed contrived. Mr. Murphy never refused to disclose his statements to the media and Plaintiffs are not asserting that any such statements are privileged. Mr. Murphy testified that he did not remember the specifics of the conversation he had with Ms. Woyke (Murphy Dep., 127:17, 137:16) and that he spoke to no other reporters (Murphy Dep. at 155). Accordingly, all of the questions that then followed asking whether Ms. Woyke has "misquoted" him were pointless and harassing. After all, how can a witness acknowledge that a statement he does not recall making to a reporter has been accurately quoted?

C. Google's Argument (at pp. 2-3)That It Should Be Permitted To Question Mr. Murphy About The Content Of The Complaint As Well As Its Exhibits

Google complains that Mr. Murphy would not answer questions regarding whether he was aware at the time he filed the complaint that ADC was involuntarily dissolved. But this entire line of questioning is both pointless and harassing. It is pointless, because the corporate history is a matter of public record and many of the corporate documents were used as exhibits in this case. It is harassing because as Shelton teaches, attorneys should not be deposed on subjects

that can be covered with other witnesses. But here, the real purpose of Google's questions was to find out what Mr. Murphy knew and what he did to prepare the Complaint. And that entire line of questioning is clearly improper and in violation of the work product doctrine.

D. Google's Argument (at pp. 3-4) That The Note Written By Mr. Murphy's Counsel Is Discoverable Under Federal Rule Of Evidence 612

Mr. Fleming, who represented Mr. Murphy at the deposition, wrote a note to his client that is privileged and not subject to discovery by Google. Google's reliance on FRE 612 is misplaced. That Rule concerns writings that are shown to a witness for the purpose of refreshing the witness's recollection. Here there has been no showing that Mr. Fleming's note to Mr. Murphy served such purpose. Thus, Rule 612 is irrelevant here.

In any event, if the Court decides that it is necessary to review the note *in camera* to confirm that this is so, Mr. Fleming will gladly provide the note to the Court for that limited purpose, while reserving all claims of privilege with respect thereto.

E. Google's Argument (at pp. 5-6) That Its Harassment Of Mr. Murphy Is Not Grounds For Sanctions

Plaintiffs' request for sanctions against Google for its harassment of Mr. Murphy is proper and well-founded. When Google's counsel signed the subpoena requesting Mr. Murphy's deposition, it thereby certified under Fed. R. Civ. P. 26(g) that the deposition was not being taken "for any improper purpose, such as to harass." Fed. R. Civ. P. 26(g)(1)(B)(ii) (emphasis added). Rule 26(g) provides that any unjustified failure to comply with a certification given in accordance with the Rule is sanctionable. Fed. R. Civ. P. 26(g)(3). Indeed, even if Plaintiffs had not asked for sanctions, Rule 26(g)(3) actually requires the Court to impose such sanctions "on its own" if it finds Google's questioning of Mr. Murphy was harassing in violation of the Rule.

III.

CONCLUSION

For the reasons set forth above and in their initial brief, Plaintiffs respectfully request that:

(a) Plaintiffs' cross-Motion be granted and that Plaintiffs be granted a protective order precluding any further deposition of Mr. Murphy and awarding Plaintiffs the costs incurred in briefing these motions including reasonable attorneys' fees; and

(b) Plaintiffs be awarded such further relief as is appropriate.

ERICH SPECHT, an individual and doing business as ANDROID DATA CORPORATION, and THE ANDROID'S DUNGEON INCORPORATED

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CERTIFICATE OF SERVICE

P. Andrew Fleming, an attorney, certifies that he served the foregoing by causing a true and correct copy to be delivered by the ECF system to:

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on this 9th day of June, 2010.

/s/ P. Andrew Fleming
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