

**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 MOTION AND MEMORANDUM IN SUPPORT OF ITS MOTION TO  
COMPEL PLAINTIFFS TO ATTEND SCHEDULED DEPOSITIONS**

---

Google seeks an Order from this Court compelling Plaintiffs to attend previously-agreed-upon depositions. The parties have agreed upon certain deposition dates prior to the July 30, 2010 close of oral discovery. Plaintiffs have just unilaterally cancelled these depositions, including the deposition of Plaintiff Erich Specht. Google’s counsel conferred with Plaintiffs in good faith in an effort to obtain cooperation without Court action, but Plaintiffs will not agree to go forward with the scheduled depositions.

**I. FACTS**

Oral discovery in this case is scheduled to close on July 30, 2010<sup>1</sup>. Since May, Google has worked extensively with Plaintiffs to accommodate what they claimed to be limitations on deposition scheduling. For example, Plaintiffs turned down Google’s offer to present Andy Rubin on June 2<sup>nd</sup> or June 3<sup>rd</sup>, opting instead for July 9<sup>th</sup>. (Exs. A, B.) Plaintiffs also declined to make Mr. Specht available for deposition in June as Google requested (Ex. C), insisting that he could not be made available until July 21<sup>st</sup> (Ex. F.) The parties’ respective counsel have invested substantial time in scheduling each parties’ requested depositions, as reflected in the attached

---

<sup>1</sup> Written fact discovery has been closed since March 31, 2010.

emails (Exs. A-J).<sup>2</sup> Currently, the parties have scheduled, and agreed upon, the following deposition dates:

- (1) July 21<sup>st</sup>: Erich Specht (Plaintiff).
- (2) July 27<sup>th</sup>: Jordan May (A subpoenaed third party witness to whom Mr. Specht claims to have provided services in connection with his purported trademarks).
- (3) July 28<sup>th</sup>: Cliff Petrovsky (A subpoenaed third party investigator who in 2007 confirmed that Plaintiffs were no longer in business).
- (4) July 30<sup>th</sup>: Marty Murphy (Second deposition of Plaintiffs' counsel, pursuant to the Court's June 25<sup>th</sup> Sanctions Order).

(Ex. J.)<sup>3</sup>

While Google has been patiently awaiting its opportunity to depose Mr. Specht and Plaintiffs' remaining third party witnesses, Plaintiffs have deposed Google's Rule 30(b)(6) witnesses, including Andy Rubin, the "man in charge" of the Android project. The only other witnesses Plaintiffs have expressed an interest in deposing are Linda Tong, who is no longer with Google though Google has provided Plaintiffs with her last known address, and Chris White, who is also no longer with Google though Plaintiffs' counsel has been in contact with his counsel.

Despite the impending close of discovery and the substantial effort required to arrange these depositions, Plaintiffs have now unilaterally cancelled them. On Tuesday, July 13, 2010, Plaintiffs filed a Third Amended Complaint, but did not seek leave to file it. This Third Amended Complaint names four additional defendants: Sprint Nextel Corporation, AT&T Mobility, LLC, T-Mobile USA, and Verizon Wireless. The Third Amended Complaint also adds new substantive allegations; for example, it alleges the existence and infringement of another

---

<sup>2</sup> As the Court should appreciate these correspondence do not reflect the complete effort involved or expended by the parties and the third parties in arranging the depositions.

<sup>3</sup> Google is also waiting for Plaintiffs' counsel to advise when Warren Crum (another third party witness represented by Plaintiffs' counsel and to whom Mr. Specht claims to have provided services in connection with his purported trademarks) is available for his deposition. (Id.)

unregistered trademark, “Android’s Dungeon.” Google’s opposition to the last-minute nature of this Third Amended Complaint will be set forth in detail in a separate filing. For purposes of this Motion, it is sufficient to note that Plaintiffs did not initially move for leave to file their Third Amended Complaint, and when they did so, affirmed that the Third Amended Complaint “will not result in any undue prejudice or delay,” but failed to advise the Court that they had unilaterally cancelled all remaining depositions and are refusing to participate in discovery until the “new” defendants appear, the Court reopens all discovery, and a new discovery schedule is entered. (Ex. K.)

Plaintiffs filed their Third Amended Complaint on July 13, 2010. They then deposed Google’s second 30(b)(6) witness, Jennifer Flannery, on July 14, 2010. The next day, on July 15, 2010, Plaintiffs’ counsel called Google’s counsel to announce that *they would not be proceeding with the remaining depositions as scheduled*. Plaintiffs’ excuse for cancelling these depositions is that their witnesses might have to be deposed twice, which they believe likely to occur in view of their recently-filed Third Amended Complaint. Google pointed out that Plaintiffs had not sought leave to file their Third Amended Complaint, that Google opposes the filing of the Third Amended Complaint, and that Google will move to compel the depositions to proceed as scheduled. (Ex. J.) Plaintiffs did not respond to Google’s letter, other than to belatedly file a Motion for Leave to File Third Amended Complaint. (Ex. K.)

## **II. ARGUMENT**

The Court should order Plaintiffs to proceed with discovery as scheduled and agreed. Plaintiffs have no authority to unilaterally amend the Court’s discovery schedule. Moreover, even if the Court granted leave to file the Third Amended Complaint and altered the case schedule (which Google strenuously opposes), that would not justify Plaintiffs’ attempt to unilaterally cancel scheduled depositions. This case has been ongoing for over a year and

Google is preparing a summary judgment motion dispositive of all of Plaintiffs' claims. The depositions are duly noticed or subpoenaed, and Plaintiffs have presented no substantive objection to them going forward. Plaintiffs' unilateral cancellation of all remaining depositions is nothing more than a transparent attempt to avoid the inevitable summary judgment motion. Plaintiffs' excuse that they do not want their witnesses deposed twice is unavailing; it was Plaintiffs who waited until the last minute to file the Third Amended Complaint against parties that Plaintiffs had previously identified to the Court as purported infringers and whom they concede were publicly known "within the past several months." (Ex. J, ¶ 5.)<sup>4</sup> Plaintiffs' suggestion that witnesses will need to be deposed twice is also wholly speculative. Indeed, Plaintiffs do not seem to be concerned about *Google's* witnesses being deposed twice, as Plaintiffs waited until *after* deposing Google's witnesses before announcing their purported "concern" and pulling all remaining depositions off the table.

Plaintiffs "cannot dictate the scheduling of case matters to the court, which has an inherent power to manage the cases on its docket." *Fulton v. Theradyne Corp.*, 2007 WL 772953, \*3 (N.D.Ill. 2007) (citing *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706-07 (7<sup>th</sup> Cir. 2006) ("district courts have broad discretion to manage their dockets"); *Raymond v. Ameritech Corp.*, 442 F.3d 600, 606 (7<sup>th</sup> Cir. 2006) ("[w]e live in a world of deadlines," "[t]he practice of law is no exception," and "[a] good judge has a right to assume that deadlines will be honored"); *Reales v. Consolidated Rail Corp.*, 84 F.3d 993, 996 (7<sup>th</sup> Cir. 1996) ("[t]he district courts must manage a burgeoning caseload, and they are under pressure to do so as efficiently and speedily as they can, while still accomplishing just outcomes in every civil action" and that "[p]art of that job means that they are entitled-indeed they must-enforce deadlines")). Plaintiffs have no

---

<sup>4</sup> Plaintiffs contend that their Third Amended Complaint is purportedly based on "surprising" revelation as to positions uncovered during recent depositions, but as will be set out in Google's Motion to Strike that claim is utterly false.

authority to unilaterally reschedule deposition dates. Nor do Plaintiffs have authority to unilaterally reset the July 30, 2010 close of oral discovery. The Court should exercise its inherent authority to control its case schedule to order Plaintiffs to proceed with the depositions as scheduled.

Moreover, this Court has authority to order these depositions to proceed under Rule 37 of the Federal Rules of Civil Procedure. Rule 37(a) explicitly authorizes the Court to enter an order compelling discovery, and further explicitly authorizes cost-shifting sanctions if the party resisting discovery is not substantially justified. And the Rule is stricter as applied to Mr. Specht's own deposition -- as clearly set forth at Rule 37(d)(2), a party's failure to attend a deposition is not excused unless the party has a pending motion for a protective order, and sanctions may directly issue as if the party had violated a Court Order. Plaintiffs sought no protective order before cancelling the scheduled depositions.

Accordingly, not only should the Court order these depositions to proceed as scheduled, pursuant to its inherent authority and pursuant to Rule 37(a), but it should also issue sanctions under Rule 37(a)(5)(a), in the amount of \$5,000 for efforts expended towards having the Court rule on this Motion heard.<sup>5</sup>

---

<sup>5</sup> Plaintiffs refusal to produce Mr. Murphy is a blatant violation of the Court's June 25<sup>th</sup> Sanctions Order (Dkt. No. 215). Google also has not yet received any notice from Plaintiffs indicating whether Plaintiffs or their counsel complied with the monetary sanctions imposed by the Court.

### III. CONCLUSION

Plaintiffs' meritless attempt to avoid depositions, and especially to avoid the deposition of Plaintiff Erich Specht, should be outright rejected and the Court should order Plaintiffs to comply with the schedule previously agreed between the parties, including Mr. Specht's deposition on July 20, 2010 and Mr. Murphy's deposition on July 30, 2010.

Respectfully submitted,

Dated: July 16, 2010

/s Herbert H. Finn  
Herbert H. Finn  
Jeffrey P. Dunning  
GREENBERG TRAURIG, LLP  
77 W. Wacker Drive, Suite 3100  
Chicago, IL 60601  
(312) 456-8400

Counsel for Google Inc.