

**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 RESPONSE TO PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF THEIR MOTION FOR EXTENSION OF TIME TO COMPLETE
DISCOVERY**

Plaintiffs’ “Supplemental” memorandum is not a supplemental memorandum at all, but rather an attempt to submit a motion to compel without having complied with any of the meet-and-confer requirements of Rule 37. Indeed, Plaintiffs have seized on their lack of a meet and confer and submitted to the Court a number of purported “issues” that are little more than a shameless series of outright misrepresentations and omissions. As set forth below, Plaintiffs have not timely sought discovery and as a result, no extension to discovery should be granted.

I. Any Incomplete Third Party Discovery is Due Solely to Plaintiffs’ Own Lack of Diligence.

It is significant that the majority of Plaintiffs’ supplemental brief rests on third party discovery, not discovery from Google. Despite Plaintiffs’ attempts to castigate Google for Plaintiffs’ failure to complete this third party discovery, Google has no involvement in Plaintiffs’ own failure to timely pursue third party discovery.

A. Plaintiffs Misled the Court Regarding Chris White.

In their Supplemental Memorandum, Plaintiffs stated that “negotiations are ongoing.” and that “no dates have yet been proposed by Mr. White as to when he will sit for a deposition.”

(Supp. Mem. at 11.) Those statements are absolutely false. At the time Plaintiffs filed their Supplemental Memorandum, agreement had been reached as to the length of deposition, the scope of the deposition, the location and production of documents and Mr. White, through counsel, had offered the date of July 26th for his deposition. (Ex. A.). Ten days later, Plaintiffs had not responded to the proposed date -- all of which was directly contrary to Plaintiffs' representations to the Court. Google is simply astounded that Plaintiffs would be so desperate to extend discovery and stall the forthcoming dispositive motions that they would outright misrepresent the facts.

Notwithstanding, Plaintiffs' falsehoods, Chris White is currently scheduled to be deposed on July 27th. Accordingly, his deposition is simply no basis to extend oral discovery.¹

B. Plaintiffs Did Not Timely Seek Discovery From LucasFilms.

Plaintiffs' lack of diligence with respect to LucasFilms also does not warrant an extension of discovery. Plaintiffs have been seeking discovery from various third parties, including LucasFilms, regarding trademark licensing. The relevance of these third party license agreements, if they exist, is rather questionable. For example, if there is a formal license agreement between Verizon and LucasFilms for the mark "DROID," associated with the multi-billion dollar Star Wars franchise, it is unclear how that license agreement would be analogous, for damages purposes, to Mr. Specht's mark "ANDROID DATA," associated solely with a business he ran out of his house that only made a handful of sales during its brief existence.

But setting aside the questionable relevance of Plaintiffs' pursuit of these third party license agreements, Plaintiffs failed to mention that they did not even attempt to subpoena

¹ Of course, all of Plaintiffs' discussion of Mr. White remains much ado about nothing. Plaintiffs have yet to explain how Mr. White's deposition could be relevant to this case, since he was not involved in the decision to adopt the name "Android" for Google's open source mobile phone operating system. Indeed, he left Google years before any decision on a name was made. And Plaintiffs failed to note that they never did serve a subpoena on Mr. White -- he is attending a deposition voluntarily, at the urging of his, and Google's counsel.

LucasFilms until April 28, 2010. That April 28th subpoena sought only documents, despite the fact that written discovery had already closed in this case. (Ex. B.) Plaintiffs received objections from LucasFilms on May 4, 2010, who objected in part based on the fact that the written discovery period was closed in this case. (Ex. C.) Plaintiffs issued a second subpoena (seeking documents and a deposition) on May 11, 2010 (Ex. D), to which LucasFilms again objected on May 21, 2010. (Ex. E). Despite the purported urgency of this discovery, Plaintiffs took no further action for over a month until July 7, 2010 -- when they filed a Motion to Compel in the Northern District of California.

Not only were Plaintiffs not diligent in seeking discovery from LucasFilms, but Plaintiffs have again asserted facts to both the Northern District of California and this Court that are simply wrong. In Plaintiffs' Motion to Compel in the Northern District of California, Plaintiffs' counsel took the incredible position that there is no close of written discovery in this case for third parties, that third party written discovery was still permitted. (Ex. F, Fleming Declaration ¶5). And in Plaintiff's Supplemental Memorandum, they withheld from this Court that the Northern District of California has already denied their motion to compel (though without prejudice). (Ex. G.) Despite more than a week passing since their Motion to Compel was denied, Plaintiffs have taken no further action in the Northern District of California. Of course, the longer Plaintiffs wait to put the issue before the Northern District of California, the longer it will take to resolve it -- if ever.

Plaintiffs could have sought discovery from LucasFilms ages ago -- yet they waited until just before the close of discovery to pursue that information, while at the same time continuing their pattern of being less-than-forthcoming with all of the facts. Plaintiffs' behavior illustrates

that this is once again a tactic to stall litigation, rather than a genuine effort to obtain relevant discovery.

C. Plaintiffs Did Not Timely Seek Discovery From Linda Tong.

Plaintiffs imply that they are seeking Linda Tong's deposition because she appears on Google's may call witness list. Ms. Tong is a former Google employee who left Google within the last few months. After advising Plaintiffs that Ms. Tong no longer is employed by Google, Google asked whether Plaintiffs still were interested in conducting her deposition. Plaintiffs, without reference to Google's may call witness list, confirmed their intent to take her deposition. Google does not currently intend to call Ms. Tong as a witness at trial and believes that her deposition is unnecessary. Nonetheless, Google provided Plaintiffs with Ms. Tong's last known address on July 12th, so that they could conduct the deposition they were seeking.

That said, Plaintiffs also did not act in a timely manner with respect to Linda Tong. Although Plaintiffs had Ms. Tong's last known address, despite the impending close of discovery, they waited more than a week to even attempt service of a subpoena. Indeed, they did not issue their subpoena to Ms. Tong until July 20, 2010 (Ex. H) -- and only *after* this Court rejected their attempt to cancel all pending depositions. The fact that Plaintiffs did not timely seek Ms. Tong's deposition does not justify a general extension to the discovery period.

II. Plaintiffs' Claims of Lack of Cooperation are Also Misrepresented and Do Not In Any Way Justify A General Extension.

As with Plaintiffs' claims that they need to conduct additional third party discovery, Plaintiffs' claims that Google has purportedly not cooperated in discovery are misleading at best.

A. Google Has Not "failed" to Produce 800 Documents.

While Plaintiffs claim that Google has purportedly "failed" to produce 800 documents in "usable" format, Plaintiffs withheld from the Court that the documents in question **never existed**

in “usable” format. Google’s thorough keyword searching of documents uncovered more than just traditional documents; it also uncovered programming code, fonts, system files, and even corrupt file fragments. (See Nelson Decl., Ex. I.) Google identified these files in its document production because they responded to keyword searches (many of the files contain “android” in the name of the file). (Id.) But over 600 of these 800 files appear to be nothing more than mere file fragments; they are too small in size to contain any useful data, and are unopenable. (Id.) The remainder of these files comprise program code, font files, and other system files that likely bear no relevance to this litigation. Of course, Plaintiffs were well aware of all of this before they filed their Supplemental Brief, but once again attempted to mislead the Court by exaggerating the “800 files” without mentioning that they had been given information that the files were not capable of being opened. As such, Plaintiffs’ allegations that Google has somehow violated the Federal Rules by failing to provide these files in a “usable” format, when no such “usable” format exists is simply ridiculous. In any event, all of the files (including the native, unopenable format) are now in Plaintiffs’ counsel possession -- again providing no basis for extending discovery.

B. Google Has Not Failed to Produce Relevant Financial Discovery.

Though Plaintiffs claim that Google has failed to provide relevant financial discovery, they do not identify anywhere in their motion what exactly it is they believe they are entitled to. This, of course, goes hand in hand with Plaintiffs’ failure to conduct a proper Rule 37 conference before submitting their Supplemental Memorandum. It is important to note that what Plaintiffs allege in this case is *reverse* confusion. Thus, Google’s profits are irrelevant because Plaintiffs have conceded that Google is not trading off of Plaintiffs’ name. Instead, Plaintiffs only complain that their (purported) mark will be crowded out by Google’s use of its own mark. See *Trovan Ltd. v. Pfizer, Inc.*, No. CV-98-0094 LGB (MCx), 2000 U.S. Dist LEXIS 7522 (D.C. Cal.

May 25, 2000) (quoting J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS § 30:84 (5th ed. 1999)) (noting that damages award should not exceed value of Plaintiffs' own mark). Accordingly, detailed examination of Google's profits is unnecessary and irrelevant to the case.

Moreover, Plaintiffs did not exhaust Ms. Flannery's knowledge during the deposition. Indeed, Plaintiffs stopped the deposition after being explicitly cautioned that Ms. Flannery had additional knowledge they had not explored. (Ex. J.) Likewise, they again misrepresent that Google explicitly advised in advance that certain topics were objected. Contrary to Plaintiffs representations in footnote 4 on page 5 of the Supplemental Memorandum, at no time has Google waived its objection to producing a corporate witness on certain financial related topics. Rather, Google reaffirmed its objection, but noted that it would not instruct the witness not to answer if the witness had any level of personal knowledge. (Ex. K.) As with their other misrepresentations, Plaintiffs have withheld from the Court all of the financial information that Google has provided in the form of interrogatory responses, which included the dollars generated from registration fees, downloads of applications, and sales of promotional paraphernalia.

Ignoring all of this, and assuming *arguendo* that Plaintiffs are entitled to further information regarding Google's finances, which Google does not agree with, Plaintiffs have not explained in their Supplemental Memorandum what it is they seek or why they need additional time to get it; if all Plaintiffs seek are a few additional spreadsheets, those can be easily provided after a proper meet-and-confer under Rule 37, which Plaintiffs still have not requested.

C. Plaintiffs Do Not Identify What Subjects Or Communications Listed In Google's Privilege Log Merit Further Discovery.

Finally, Plaintiffs allege that there are purportedly unresolved issues with respect to Google's privilege log. Plaintiffs claim to have a disagreement over whether certain documents are in fact privileged, but Plaintiffs have made no effort to date to seek Court intervention on that

issue, which they contend they have been aware of for months. As with Plaintiffs' complaints regarding financial discovery, Plaintiffs' complaints regarding Google's privilege log are vague and unsubstantiated, and Plaintiffs once again fail to point out what information on Google's privilege log, if ultimately discoverable, would advance the case.

III. To the Extent Any Issues May Exist Between the Parties, They Are Damages Related and May Be Handled, If Ever, During Expert Discovery, If Necessary

To the extent that this Court believes that Plaintiffs had adequately identified discovery issues remaining between Plaintiffs and Google that require additional time to resolve, those issues are not related to issues of Google's liability. Rather, they appear to be related to issues of Google's potential damages exposure. As Mr. Specht has testified that he knows of no damages and that they are, in his mind, speculative, Plaintiffs' damages theory will presumably require expert discovery. These discovery "issues," to the extent they exist, may be addressed, if ever, during expert discovery -- and without a general extension of fact discovery.

IV. Conclusion

When Plaintiffs originally sought an extension of discovery from the Court, they failed to provide specific information about discovery they purportedly could not complete before July 30, 2010. At that time, the Court admonished Plaintiffs that they must be specific as to what additional discovery necessitates and extension. However, Plaintiffs' Supplemental Memorandum does not clarify the issues for the Court.

With respect to the third party discovery raised by Plaintiffs, Plaintiffs did not act in a timely manner, and it appears that their pursuit of this discovery is only for the purpose of delay. With respect to the various items that Plaintiffs allege Google has not provided, despite several pages of argument Plaintiffs never identify any particular category of discovery they seek and its

particular relevance to the case. Indeed, Plaintiffs requested no Rule 37 conferences regarding these issues.

Plaintiffs have not identified a sufficient reason for a three-month general extension to fact discovery. Of course, the parties are engaged in a number of fact witness depositions during this final week of discovery and it remains possible that some narrow issue might need to be pursued after July 30th. And, of course, if Plaintiffs engage in a proper Rule 37 conference(s) with Google, additional issues may arise. But Plaintiffs have not shown even one particular category of discovery for which further information is needed, let alone a reason to generally extend discovery.

Moreover, Google intends to file dispositive motions addressing Plaintiffs' abandonment of their trademarks. That summary judgment motion will dispose of all of Plaintiffs' claims and, as a result, all of these ancillary purported discovery issues.

Respectfully submitted,

Dated: July 26, 2010

/s Cameron M. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing and GOOGLE'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY with the Clerk of Court using the CM/ECF system, which will provide a copy to counsel of record.

Dated: July 26, 2010

s/ Cameron M. Nelson