

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NORTHEASTERN UNIVERSITY and
JARG CORPORATION

Plaintiffs,

v.

GOOGLE INC.

Defendant.

Case No. 2:07-CV-486-CE

JURY TRIAL DEMANDED

**PLAINTIFFS NORTHEASTERN UNIVERSITY AND JARG CORP.'S
OBJECTIONS TO DEFENDANT GOOGLE INC.'S AMENDED WITNESS LIST,
COUNTER EXHIBIT LIST, AND COUNTER-DEPOSITION DESIGNATIONS**

Plaintiffs Northeastern University and Jarg Corporation file and serve their objections to Defendant Google Inc.'s Amended Witness List, Counter Exhibit List, and Counter-Deposition Designations served on Plaintiffs on March 4, 2011.

1. Plaintiffs object to Defendant's Amended Witness List and Counter Exhibit List as failing to comply with this Court's August 21, 2008 Discovery Order, which requires each party to separately identify those witnesses it will call and those it may call and to separately identify those exhibits that the party will offer and those that may be offered. (Dkt. No. 32 at ¶ 6(a)-(b).)

2. Plaintiffs object to Defendant's Amended Witness List and Counter Exhibit List as untimely. Pursuant to the August 21, 2008 Court's Discovery Order, the parties were to serve: (1) "[t]he name and, if not previously provided, the address and telephone number, of each witness, separately identifying those whom the party expects to present at trial and those whom the party may call if the need arises;" and (2) "an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises." (Dkt. No. 32).

Pursuant to the Court's August 21, 2008 Docket Control Order, these pretrial disclosures were due on February 18, 2011. (Dkt. 33.) The parties exchanged their Witness and Exhibits Lists on February 18, 2011, as required.¹ Two weeks after the Court's deadline, on March 4, 2011, Google served its Amended Witness List and Counter Exhibit List. Google's Amended Witness List includes three witnesses who did not appear on its original Witness List: Michael Belanger, Jim Belanger, and Anthony Pirri.² Google's Counter Exhibit List contains nine documents, seven of which were not listed on Google's initial Exhibit List and/or Plaintiffs' initial Exhibit List.³

Moreover, Google failed to timely produce one of the documents on its Counter Exhibit List: GN555861-GN556208, which is the file history for U.S. Patent Application No. 11/694,802 ("the '802 Application").⁴ As set forth in Plaintiffs' Damages Related Motion in Limine, filed on March 7, 2011 (Dkt. No. 146),⁵ Google did not produce either the '802 Application or its file history until January 28, 2011—well after the Court's July 2, 2009 and May 7, 2010 production deadlines for liability and damages related documents, respectively,⁶ and more than two years after Plaintiffs specifically requested that Google produce any patent applications relating to

¹ Both parties have subsequently corrected clerical errors on their Exhibit List.

² Jim Belanger and Anthony Pirri are not current employees of Plaintiffs or otherwise under Plaintiffs' control, and both individuals reside more than a 100 miles from Marshall, Texas.

³ GN 015842-46 appears on Google's initial Exhibit List and its Counter Exhibit List, as well as Plaintiffs' Exhibit List. Additionally, GN0011947-97 appears on Plaintiffs' Exhibit List. Accordingly, Plaintiffs have no objection to Defendant using either of these documents at trial.

⁴ GN555861-GN556208 should be excluded pursuant to Plaintiffs' Non-Damages Related Motion in Limine #10, which seeks to preclude Google from offering evidence that it was obligated to disclose during discovery, but that Google did not timely disclose. (Dkt. 132.)

⁵ Plaintiffs' Damages Related Motion in Limine further seeks to exclude, *inter alia*, the '802 Application under FED. R. EVID. 401, 402, and 403. Plaintiffs expressly incorporate limine topic # 2 from their Damages Related Motion in Limine and the evidence and authority cited therein.

⁶ Order Granting Joint Motion to Extend Time, June 5, 2009 (Dkt. No. 60); Discovery Order, dated Aug. 21, 2008 (Dkt. No. 33).

Teragooogle.⁷ Google's multi-year production delay is not harmless. Google's failure to timely comply with the Court's Orders wholly thwarted any opportunity for Plaintiffs to inquire or otherwise conduct a cross-examination on this issue because, *inter alia*, Plaintiffs (1) could not obtain the '802 Application, which is not publically available, *sua sponte*; and thus (2) have not deposed three Google engineers who were listed as inventors on the '802 but who were not listed by Google as persons with knowledge of relevant information pursuant to Rule 26 of the Federal Rules of Civil Procedure.

Rule 16(f) of the Federal Rules of Civil Procedure provides the Court with the discretion to issue sanctions, including those set forth in Rule 37(b)(2)(ii)-(vii), "when a party fails to obey a scheduling or pretrial order." FED. R. CIV. P. 16(f)(C). Rule 37 of the Federal Rules of Civil Procedure explicitly provides that if a party fails to obey a court order, the court may issue an order "striking pleadings in whole or in part" or "dismissing the action or proceeding in whole or in part" or "rendering a default judgment against the disobedient party." FED. R. CIV. P. 37(b)(2)(A)(iii), (v) & (vi). In addition, Rule 37 provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." FED. R. EVID. 37(B)(2)(c)(1).

Without question, Google's Amended Witness List and Counter Exhibit List are untimely. Google's untimely production and/or identification of the documents on its Counter Exhibit List and untimely identification of the additional witnesses on its Amended Witness List occurred without agreement from Plaintiffs, without leave of the Court, and in violation of the Court's Discovery Order and Docket Control Order. Further, Google wholly failed to even

⁷ See Letter to Jason Wolff from Stephen Stout, dated Jan. 16, 2009, attached hereto as Exhibit 4.

acknowledge its untimeliness and made no attempt to show cause why its late-filed list should be considered by the Court. Accordingly, Google should not be permitted to offer the eight late produced and/or identified exhibits or testimony from the three late identified witnesses.

3. Plaintiffs generally object to any document or exhibit identified on Defendant's Counter Exhibit List that is the subject of the parties' agreed motion in limine or Plaintiffs' motions in limine, motions to exclude certain evidence, Daubert motions and challenges to experts (if any), and any dispositive motions. Plaintiffs reserve their right to make additional objections leading up to and at trial. Subject to the foregoing, Plaintiffs object to Defendant's Counter Exhibit List as set forth in Exhibit A hereto.

4. In addition to the specific objections identified in Exhibit B hereto, Plaintiffs object to Defendant's Counter Designations under FED. R. EVID. 801 & 804 and FED. R. CIV. P. 32. Specifically, Defendant should not be permitted to use any of the counter deposition testimony it has designated from any witness that appears at trial for any purpose, other than proper impeachment, unless Plaintiffs first use deposition testimony from that particular witness. *See* FED. R. CIV. P. 32(a)(6).

Additionally, Defendant should not be permitted to use any of the counter deposition testimony from any witness who does not appear at trial but whose attendance Defendant could have procured by process or other reasonable means, including Bill Coughran, Sunil Daluvoy, Jeffrey Dean, Nadav Eiron, Urs Hoelzle, Cosmos Nicolaou, Anna Patterson, Yonatan Zunger, and Kaustuv. A party can rely on deposition testimony if the witness is unavailable under FED. R. EVID. 804(a)(5) & (b)(1) or Fed. R. Civ. P. 32(4)(D). But each of the witnesses specifically listed above is a current employee of Google and thus is not unavailable within the meaning of the Rules. Instead, Defendant can procure the attendance of each of these witnesses at trial. *See*

Canal Indem. Co. v. Palmview Fast Freight Transp., Inc., No. 3:09-CV-0451, 2010 WL 645833, at *3 (N.D. Tex. Feb. 24, 2010) (“But even assuming that witnesses are needed in this case, any corporate representative of Canal is within Canal’s control and can be compelled to attend proceedings in Dallas.”); *AT&T Intellectual Prop. I, L.P. v. Airbiquity Inc.*, No. 3:08-CV-1637, 2009 WL 774350, at *4 (N.D. Tex. Mar. 24, 2009) (“Airbiquity can require its employee witnesses to attend trial.”); *Hartfield v. Offshore Oil Servs.*, No. G-06-275, 2006 U.S. Dist. LEXIS 69469, at *16-17 (S.D. Tex. Sept. 14, 2006) (“[D]efendants can compel the attendance at trial of their own employees”); *Continental Airlines, Inc. v. Am. Airlines, Inc.*, 805 F. Supp. 1392, 1397 (S.D. Tex. 1992) (concluding that a party will be able to compel testimony at trial of its own employees). Accordingly, Defendant should be precluded from offering any deposition testimony from these nine witnesses unless Plaintiffs first use deposition testimony from these witnesses during trial. *See* FED. R. CIV. P. 32(a)(6).

Further, Plaintiffs generally object to any deposition testimony designated by Defendant that is the subject of the parties’ agreed motion in limine or Plaintiffs’ motions in limine, motions to exclude certain evidence, Daubert motions and challenges to experts (if any), and any dispositive motions. Plaintiffs reserve their right to make additional objections leading up to and at trial. Subject to the foregoing, Plaintiffs’ object to Defendant’s Counter Deposition Designations as set forth in Exhibit B.

Dated: March 18, 2011

Respectfully submitted,

/s/ Nicole E. Glauser

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***ATTORNEYS FOR PLAINTIFFS
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 18th day of March 2011.

/s/ Nicole E. Glauser

Nicole E. Glauser