Eolas Technologies Incorporated v. Adobe Systems Incorporated et al Doc. 325

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

Eolas Technologies Incorporated,	)	
	)	
Plaintiff,	)	Civil Action No. 6:09-cv-446
	)	
vs.	)	
	)	
Adobe Systems Inc., Amazon.com, Inc., Apple Inc., Blockbuster Inc., CDW Corp., Citigroup Inc., eBay Inc., Frito-Lay, Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Company, Inc., JPMorgan Chase & Co., New Frontier Media, Inc., Office Depot, Inc., Perot Systems Corp., Playboy Enterprises International, Inc., Rent-A-Center, Inc., Staples, Inc., Sun Microsystems Inc., Texas Instruments Inc., Yahoo! Inc., and YouTube, LLC	)	
	)	
Defendants.	)	

MOTION FOR A PROTECTIVE ORDER BY DEFENDANT STAPLES, INC.

Introduction

Defendant Staples, Inc. ("Staples") moves for a protective order under Fed. R. Civ. P. 26(c) to prevent Plaintiff Eolas Technologies Inc. ("Eolas") from deposing certain Staples employees relating to jurisdictional issues in violation of an agreement between Staples and Eolas to forgo any such depositions.

In particular, in connection with Defendants' motion to transfer [Dkt. 214], Eolas requested either a Rule 30(b)(6) deposition from each defendant on venue-related issues or a declaration, approved by Eolas, addressing specific venue-related topics about which Eolas represented that it needed discovery. For Staples, these topics primarily related to Staples' connections with Massachusetts and Texas. Eolas did not request any information about Staples'

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contacts with California, where the pending motion seeks transfer. Eolas did not condition its agreement to forego jurisdictional discovery on anything other than providing the requested declarations. In particular, Eolas did not require Staples to forego joining the motion to transfer or to forego filing any additional papers with the Court on that motion, as part of the agreement.

Staples provided the requested declarations, which Eolas approved. Eolas then filed a brief with this Court [Dkt. 291], suggesting that Texas is no more inconvenient for Staples than California because "Staples is headquartered in Framingham, MA and has '11 retail stores and 1 nonretail facility in the Eastern District of Texas'... The majority of the electronic and physical documents relevant to this case and the servers hosting the Staples.com website are in Massachusetts...[and] Massachusetts is much closer to the EDTX than to the NCDA." Dkt. 291 at 7. To ensure that the Court had accurate information about Staples' contacts with California, Staples submitted the declarations of Paul Van Camp and Joanne Donahue on June 14, 2010. [Dkt. 322-1, 322-2]. Staples also joined in the motion to transfer. [Dkt. 322].

On that same day, June 14, 2010, Eolas noticed depositions of the two Staples employees who had submitted the June 14 declarations – discovery which Eolas admits is for jurisdictional purposes. Despite never having requested Staples to forego joining the motion or filing additional papers with the Court on the motion to transfer, Eolas now claims that Staples' joinder of the motion and the submission of declarations to correct the record on Staples' contacts with California somehow abrogated the agreement.

Despite the agreement, and in an effort to avoid this dispute, Staples volunteered to provide whatever additional information Eolas wished about Staples' contacts with California. Eolas has not only refused, but insists that the depositions must take place before the due date for Eolas' surreply on the motion to transfer. Accordingly, Staples is left with no choice but to bring

this motion for a protective order.

Argument

A protective order is appropriate to prevent a party from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). A district court has broad discretion to decide discovery issues, including whether to grant a protective order under Rule 26(c). *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 28 F. 3d 1388, 1394 (5th Cir. 1994). A protective order is appropriate in this case for at least two reasons.

First, deposition notices are in direct violation of a discovery agreement between Eolas and Staples. That agreement was designed to find an efficient and cost-effective solution to Eolas's representation about the information it required to support its opposition to the motion to transfer. Eolas explicitly promised Staples that "once we receive an executed version [of the declarations] Eolas will withdraw its venue-related discovery as to Staples." McTague Decl. Ex. 2. In reliance on this representation, Staples provided three executed declarations to Eolas on May 30, 2010. For discovery to proceed in an organized manner, especially in a case such as this with many defendants, the parties must be able to make, and rely on, agreements regarding discovery issues. As a result, Eolas should not be permitted to renege on its agreement with Staples and force Staples to present witnesses for venue-related depositions.

The mere fact that Staples subsequently joined the motion to transfer and submitted additional declarations relating to its contacts with California – declarations that no one contends are inconsistent or contradictory in any way with the prior, requested declarations about its contacts with Massachusetts and Texas – does not change the parties' agreement. Eolas could have insisted, as a condition of foregoing jurisdictional discovery, that Staples not join the

motion to transfer or not submit any other papers on the motion, and Staples could then have decided if it was willing to agree to those conditions. Eolas, however, did not ask for any such conditions, and now seeks depositions on exactly the same topic that it agreed to forego.

Second, the depositions are unduly burdensome and not the most efficient or cost-effective method for Eolas to obtain whatever information it seeks. Nor is it clear what information Eolas does seek – the declarations merely discuss unremarkable, undisputable facts such as the number of stores that Staples has in California. Indeed, during the meet and confer, Eolas declined, despite request, to identify ***any*** particular information it could only obtain, or more effectively or efficiently obtain, through deposition. Given that Staples has also offered to provide Eolas with declarations or documentation containing any additional information Eolas purportedly requires (McTague Decl. Ex. 1), the noticed depositions are not only in violation of the parties' agreement but also unduly burdensome and unnecessary, particularly in the timeframe in which Eolas insists that they must occur.

CONCLUSION

For the foregoing reasons, Staples respectfully requests that the Court enter a protective order barring Eolas from deposing Staples or its employees on venue-related topics, as agreed by the parties.

Date: June 18, 2010

Respectfully submitted,

/s/ Michael E. Richardson

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ATTORNEYS FOR DEFENDANT STAPLES INC.

Certificate of Conference

In compliance with Local Rule CV-7(i), this certifies that 1) counsel has complied with the meet and confer requirement in Local Rule CV-7(h) and 2) this motion is opposed. On Friday, June 18, 2010, Mark Matuschak, lead counsel for Staples and Michael Richardson, local counsel for Staples, conferred with Joshua Budwin, counsel for Eolas, by telephone. Michael McKool, lead counsel for Eolas, was unable to participate due to his appearance at trial before the International Trade Commission this week and next week. Counsel negotiated in good faith but were unable to agree as to whether or not the depositions were necessary. Staples contends that the agreement regarding venue-related discovery precludes Eolas taking these depositions, that these depositions are burdensome, and that Staples has already provided all of the venue-related information that Eolas requested. Eolas contends that Staples' filing of venue-related declarations with the Court opened the door to venue-related depositions. Discussions have conclusively ended in an impasse, and there is therefore an open issue for this Court to resolve.

/s/ Mark Matuschak

Certificate of Service

I certify that the foregoing motion, the declaration of Alexandra McTague in support of the motion, and the proposed order, were served on all counsel of record by ECF this 18th day of June, 2010.

/s/ Michael Richardson