

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

WALKER DIGITAL, LLC,

Plaintiff,

v.

MYSFACE, INC.,
NEWS CORP.,
FRIENDSTER, INC.,
LINKEDIN CORP.,
BUCKAROO ACQUISITION CORP.,
CRITERION CAPITAL PARTNERS LP,
GOOGLE INC.,
TAGGED, INC., and
FACEBOOK, INC.,

Defendants.

CASE NO. _____

C.A. No. 1:11-cv-00318-LPS
*Pending in the United States District
Court for the District of Delaware*

**MEMORANDUM IN SUPPORT OF GOOGLE INC.'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM
SUBPOENA RESPONDENT IP NAVIGATION GROUP, LLC**

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SUMMARY

On June 13, 2012, Google Inc. (“Google”) served a subpoena duces tecum from the Northern District of Texas upon IP Navigation Group, LLC (“IP Nav”) seeking documents relevant to the underlying patent litigation in Delaware filed by Walker Digital, LLC (“Walker Digital”), a business partner of IP Nav. IP Nav’s own public statements establish that it has played a key role in the attempted monetization of the patents-in-suit and that it has possession of relevant information, such as analyses of the patents-in-suit and communications with third-party licensees. Despite extensive meet and confer discussions, IP Nav has failed to comply with the subpoena, producing fewer than two dozen documents which even include two copies of the complaint filed by Walker Digital in the underlying litigation.

IP Nav does not dispute that it has possession, custody, or control of the requested documents. IP Nav also has no genuine basis to contend that it would be unduly burdensome to produce approximately 1200 pages of clearly relevant documents. IP Nav’s sole basis for refusing to comply with the subpoena is that the requested documents are subject to a common interest privilege or protected from disclosure as settlement discussions. IP Nav’s position is predicated on a faulty interpretation of the common interest privilege and Rule 408 of the Federal Rules of Evidence. As set forth more fully below, the common interest privilege is only applicable to documents that are otherwise subject to attorney-client privilege or the work product doctrine which are shared between companies that share a common legal interest over the subject matter of the underlying privileged document. The common interest privilege does not indiscriminately shield all documents and communications shared between two companies merely because the companies share a common interest, particularly when the documents themselves do not contain any confidential legal advice or attorney work product. Documents

relating to settlement discussions, which are clearly relevant and discoverable based on established case authority, also cannot be shielded from discovery.

Therefore, for the reasons set forth herein, Google respectfully requests that the Court order IP Nav to comply with the subpoena and immediately produce all responsive documents and to provide an adequate privilege log as to any documents being withheld on the grounds of a valid privilege.

FACTUAL BACKGROUND

IP Nav is a patent monetization firm headquartered in Dallas, Texas. *See* www.ipnav.com/about-us [App. 0001]. Plaintiff Walker Digital, LLC touts itself as a “research and development lab” and claims ownership of approximately 400 patents. *Id.*; *see also* http://www.walkerdigital.com/about-us_the-company.html [App. 0005-0006]. In January 2011, Walker Digital retained IP Nav after it had “made limited progress” in its previous attempts to assert its patents, including a failed attempt to auction its portfolio. *See* <http://www.ipnav.com/client-categories/customer-case-studies1/walker-digital> [App. 0007]. IP Nav “promptly designed a monetization campaign,” and at some point, “sourced experts, prosecution counsel, licensing counsel, legal counsel, and other key vendors.” *Id.* On April 11, 2011, Walker Digital filed the underlying case in Delaware against Google and a host of other defendants, alleging that the “social networking products” of the defendants infringe two patents from its portfolio: U.S. Patent No. 5,884,270 (“Method and System for Facilitating and Employment Search Incorporating User-Controlled Anonymous Communications”) and U.S. Patent No. 5,884,272 (“Method and System for Establishing and Maintaining User-Controlled

Anonymous Communications”).¹ *See* Compl. [App. 0008-0079]. On April 12, 2011, Walker Digital issued a press release identifying IP Nav as its “intellectual property advisor.” *See* Subpoena Attachment C [App. 0321-0323]. This press release quotes Erich Spangenberg, CEO of IP Nav, stating that IP Nav had “contacted these companies and urged them to come to the table” *Id.* Walker Digital has since settled with most of the originally named defendants in the underlying litigation.²

During discovery, Google served discovery requests to Walker Digital seeking, among other things, documents relating to any attempts to monetize the patents-in-suit, including documents relating to licensing and settlement negotiations, the basis for any claimed reasonable royalty, and any documents relating to any efforts to enforce the patents-in-suit against any party. *See* Google’s 1st Set of Requests at Nos. 3-4, 8- 9, 33-36, 52-58, 64; Google’s 2nd Set of Requests at Nos. 75-77, 83 [App. 0083-0107; 0302-0306]. Google also served discovery requests to Walker Digital specifically seeking documents related to IP Nav. *See* Google’s 2nd Set of Requests at No. 83 [App. 0304]. In the process of meeting and conferring with Walker Digital, Google learned that IP Nav is the entity that communicates with licensees and potential licensees of Walker Digital’s patents. *See* Letter from Google to Walker Digital of July 9, 2012 at 2 (“Your representation that Walker Digital does not communicate directly with its licensees, including the former Defendants in this action, is separate from whether Walker Digital has such

¹ Following an unconsummated sale of its patent portfolio through auction with ICAP Ocean Tomo in 2010, Walker Digital filed a series of patent infringement actions against over a hundred companies. *See Founder of Priceline Spoiling for a Fight Over Tech Patents*, Wall Street J., Aug. 22, 2011 [App. 0080-0082].

² In response to document requests propounded to Walker Digital, Walker Digital has pointed to IP Nav as the responsible entity for licensing and settlement communications. Among the documents sought by the subpoena are licensing and settlement negotiations documents exchanged with the former defendants, including infringement contentions, claim charts, and any prior art. *See* Request Nos. 2-3, 5-6, 10-11 [App. 0310-0311].

additional licensing related documents in its possession, custody, or control.”) [App. 0326-0328]; *see also* email from Walker Digital to Google of July 11, 2012 (“with respect to settlement negotiations, Walker Digital is still investigating what non-privileged, relevant and responsive documents exist. Any identified, non-privileged, relevant and responsive documents will be produced as soon as possible.... [W]ith respect to documents related to IP Navigation, Walker Digital will consider the proposal to limit the request to documents related to the patents-in-suit.”) [App. 0329].

On June 13, 2012, Google served a subpoena duces tecum upon IP Nav, seeking production of documents relating to the patents-in-suit, including agreements and communications between IP Nav and Walker Digital, communications with any of the defendants regarding the patents-in-suit, and any documents relating to licensing or settlement negotiations. *See* Subpoena [App. 0307-0325]. After requesting an extension of time to respond to the subpoena, IP Nav produced fewer than two dozen documents, consisting of two copies of Walker Digital’s complaint in the underlying litigation, copies of several other Walker Digital complaints, a series of identical form letters sent to the defendants, and a single draft presentation to Google. *See* Letter from Google to Walker Digital of Aug. 3, 2012 [App. 0347-0348]. Among other deficiencies, IP Nav had failed to produce a single communication with any of the defendants after the filing of the complaint by Walker Digital who had subsequently become licensees of the patents-in-suit. In response to Google’s inquiry regarding the lack of responsive documents in its production, IP Nav contended that the remaining documents were privileged. *See* Letter from IP Nav to Google of Aug. 10, 2012 [App. 0349-0350].

During the parties’ meet and confer regarding IP Nav’s refusal to comply with the subpoena, IP Nav conceded that communications with licensees and former defendants are not

privileged and would be produced. *See* Letter from Google to IP Nav of Aug. 28, 2012 [App. 0351-0352]. Google advised that to the extent IP Nav continued to fail to produce all responsive documents and a proper privilege log by September 7, 2012, Google would have no choice but to seek judicial assistance to obtain compliance with the June 13, 2012 subpoena.³ *Id.* On September 7, 2012, IP Nav produced one additional document, a single page organizational chart showing nothing more than the names and titles of six individuals working at IP Nav, and advised that the remaining requested documents are either privileged, should be sought from Walker Digital, or constitute third party confidential information. *See* Letter from IP Nav to Google of Sept. 7, 2012 [App. 0353-0354]. IP Nav's privilege log not only includes documents provided to or received from third parties (based on its unsupported position that settlement discussions can be protected from discovery under Fed. R. Evid. 408) but also fails to indicate whether any of the authors or recipients are attorneys or even who the purported "client" is in the withheld communications. *See* IP Nav Privilege Log Ex. A [App. 0358-0368].

³ During the meet and confer, counsel for IP Nav advised that many of the requested documents may no longer exist because document custodians had not been preserving hard copies or electronic copies of documents on their hard drives. *See* Letter from Google to IP Nav of Aug. 28, 2012 [App. 0351-0352]. To the extent documents had not been destroyed or deleted, IP Nav did not even begin document retention until June 20, 2012 even though it has claimed work product protection to withhold documents going back to January 2011. *See* Letter from IP Nav to Google of Sept. 7, 2012 ("IPNav issued a document hold memorandum to its custodians on June 20, 2012, instructing them to preserve all related documents.") [App. 0353-0354]. To exacerbate matters, the custodians themselves collected documents in response to Google's subpoena. *See* Letter from Google to IP Nav of Aug. 28, 2012 [App. 0351-0352].

ARGUMENT

I. IP Nav’s Blanket Assertion Of The Common Interest Privilege To Insulate All Documents Exchanged Between Two Business Entities From Discovery Is Unsupported by Fifth Circuit Law.

IP Nav cannot refuse to produce all documents shared between IP Nav and Walker Digital based on an unsupported allegation of the existence of a common interest.⁴ *See* Letter from IP Nav to Google of Sept. 7, 2012 at 2 [App. 0354]. In the Fifth Circuit, there are only two types of communications protected under a “common legal interest” or joint defense privilege: “(1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel.” *See In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (“because the privilege is ‘an obstacle to truthseeking,’ it must ‘be construed narrowly to effectuate necessary consultation between legal advisors and clients’”).

None of the documents listed on IP Nav’s privilege log demonstrate that they are “communications made among persons ‘who consult an attorney together as a group with common interests seeking common representation’” or “communications made in the face of imminent litigation involving multiple potential clients” *In re Santa Fe*, 272 F.3d at 711 (rejecting claim of common interest over document circulated for purposes of ensuring compliance with antitrust laws and minimize potential risk). Furthermore, to be eligible for

⁴ Even the Delaware case on which IP Nav relies to support its position on common legal interest is unavailing. In *Xerox Corp. v. Google Inc.*, 801 F. Supp. 2d 293 (D. Del. 2011), the court found that the claim of common legal interest privilege between Xerox and IPValue was supported by several factors, including the terms of the agreement between the two entities, which had been produced. *Id.* at 3 (“Xerox represents that it has produced-- and is not asserting a common interest privilege with respect to-- communications between Xerox and IPValue that did not relate to confidential legal advice.”). Unlike the circumstances in *Xerox*, IP Nav is refusing to produce all documents and communications that were shared with or involve Walker Digital in any way.

protection under the “common legal interest” doctrine in the Fifth Circuit, IP Nav must show that there was a “palpable threat of litigation at the time of the communication.”⁵ *In re Santa Fe Intern. Corp.*, 272 F.3d at 711 (“mere awareness that one’s . . . conduct might some day result in litigation” does not qualify for protection of communications between two companies).

The “common legal interest” doctrine is not an independent privilege. Rather, it extends the protection of the attorney-client privilege and work product doctrine to prevent waiver of otherwise privileged information. *See Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985) (disclosure of privileged information to third party constitutes waiver unless the “privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication”). In other words, non-privileged documents do not become shielded from discovery simply by virtue of being shared between two parties who have a common legal interest. Thus, even assuming that IP Nav had properly proven the existence of a “common legal interest,” which it has not, IP Nav is improperly applying the privilege to withhold all shared documents and communications. *See SEC v. Microtune, Inc.*, 258 F.R.D. 310, 316 (N.D. Tex. 2009) (rejecting “categorical approach” that all documents made by or sent to outside counsel are privileged).

IP Nav’s conclusory contention that its relationship with Walker Digital is “not a purely commercial relationship” is insufficient to confer attorney-client and work product protection

⁵ Similarly, for any of the documents listed in IP Nav’s privilege log to qualify for protection under the attorney work product doctrine, IP Nav must show that the documents were prepared “in anticipation of litigation or for trial.” Fed. R. Civ. P. 26(b)(3). IP Nav did not issue a litigation hold memorandum until June 20, 2012, over a year-and-a-half after it entered into a business relationship with Walker Digital. Thus, either IP Nav did not anticipate litigation or it failed to comply with its obligation to preserve relevant evidence. *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (duty to preserve arises when party “should have known that the evidence may be relevant to future litigation”).

over all documents and communications exchanged between them. *See In re Royce Homes, LP*, 449 B.R. 709 (Bankr. S.D. Tex. 2011) (rejecting proposed application of common legal interest doctrine where no evidence was presented and no common defense agreement was produced). Indeed, according to IP Nav, its patent portfolio monetization approach is “[b]usiness driven, not litigation driven.” *See* <http://www.ipnav.com/about-us/our-philosophy> [App. 0002]. Moreover, even though the “common legal interest” doctrine protects only communications between “potential co-defendants and their counsel,” *In re Santa Fe Intern. Corp.*, 272 F.3d at 710, IP Nav appears to be withholding even communications between non-lawyers. *See* Letter from IP Nav to Google of Sept. 7, 2012 at 2 (“Any relevant documents involving Jay Walker [named inventor and non-lawyer] have been included in the attached Privilege Log.”) [App. 0354]. IP Nav’s privilege log does not identify the role or job titles of any of the listed individuals, or even which entity employs the listed individuals, making it difficult if not impossible to identify how many of the purportedly privileged communications involve non-lawyers, clients, or even third parties. *Cf. Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474 (N.D. Tex. 2004) (“A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.”); *see also* Tex. R. Evid. 503(b).

IP Nav’s privilege log demonstrates that IP Nav has not met its burden to support any claim of attorney-client privilege with respect to the documents that IP Nav has managed not to destroy despite its failure to preserve documents until June 20, 2012. *See* IP Nav’s Privilege Log Ex. A (*e.g.*, claiming common interest, attorney-client privilege, and work product over an “Advisory Services Agreement;” withholding communication between Walker Digital and Facebook; failing to identify any attorneys or the companies for any listed author or recipient)

[App. 0358-0368]. Thus, IP Nav should be ordered to produce all of the documents identified in its privilege log for which it has failed to demonstrate the existence of a valid privilege as required by *In re Santa Fe* and *Navigant*.

II. Relevant Settlement Documents Are Not Shielded From Discovery Under Any Privilege or Pursuant to Fed. R. Evid. 408.

IP Nav has refused to produce numerous documents responsive to the subpoena based on a “408 privilege,” which IP Nav has designated as “Settlement Confidential,” encompassing documents sent to other parties such as Facebook, Tagged, MySpace, Friendster, and even Google. *See* IP Nav’s Privilege Log Ex. A at 1-8 [App. 0359-0366]. Nothing in Fed. R. Evid. 408 allows a party to withhold documents from disclosure in discovery. Settlement information is not only discoverable, it may be admissible for purposes other than proving liability or the amount of a claim. *See* Fed. R. Evid. 408 (compromise offers and negotiations inadmissible “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction”). Rule 408 only excludes from admissibility evidence of “furnishing, promising or offering... a valuable consideration in compromising or attempting to compromise the claim” and “conduct or a statement made during compromise negotiations about the claim.”⁶ The scope of discovery is governed by Fed. R. Civ. P. 26(a)(1), which provides that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

Indeed, the Federal Circuit has expressly rejected IP Nav’s position: “In enacting Rule 408, Congress did not take the additional step of protecting settlement negotiations from

⁶ Many of the documents included on IP Nav’s privilege log as being withheld under the “408 privilege” are also alleged to be subject to attorney-client privilege and work product doctrine. *See, e.g.*, IPNAV000264 - IPNAV000472 [App. 0359]. If evidence is inadmissible under Fed. R. Evid. 408, it would necessarily have been “furnish[ed], promis[ed], or offer[ed]” to a third party, meaning that any attorney client or work product protection is thereby waived.

discovery. Adopting a settlement privilege would require us to go further than Congress thought necessary” *In re MSTG, Inc.*, 674 F.3d 1337, 1344 (Fed. Cir.) (holding that district court did not abuse discretion by ordering production of negotiation documents underlying settlement agreements), *reh’g en banc denied* (2012). In addition, because the settlement agreements are currently the only licenses of the patents-in-suit to entities unaffiliated with Walker Digital, the underlying negotiation documents sought from IP Nav are particularly relevant and necessary to determine at least why different defendants may have settled for different amounts, the influence of any secondary agreements on the value of settlement (such as patent purchase agreements), the relationship of the patents-in-suit to the overall settlement value, the effect of each party’s infringement or invalidity contentions on the final settlement agreement, as well as the basis for the plaintiff’s reasonable royalty claim. *See, e.g., Clear with Computers, LLC v. Bergdorf Goodman*, 753 F. Supp. 2d 662, 664 (E.D. Tex. 2010) (compelling discovery of settlement negotiations where settlement agreements will “likely be the only licenses of the patents-in-suit” and therefore have “increase relevance”).

According to IP Nav, “[m]anaging an effective patent monetization campaign requires ... compiling, tagging, and mining data on patent claims and commercial products,” “analyzing each of [the] claims to assess the business case,” “retaining, consulting and coordinating with the inventors,” and “[a]ssembling and retaining a prosecution team.” *See* <http://www.ipnav.com/what-we-do/> [App. 0003-0004]. Google’s subpoena seeks IP Nav’s assessment of Walker Digital’s “business case,” including documents relating to the patents-in-suit, the named inventors, and the accused products. Any analysis of the value, invalidity, or infringement of the patents-in-suit, whether conducted by IP Nav or third parties, is highly relevant to Google’s own defenses. *See, e.g., Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 582-583

(N.D. Cal. 2008) (compelling production of documents related to third party infringement and finding that “licensing and infringement positions may be taken and discarded or otherwise changed over time based on a myriad of extrinsic factors that could well be relevant to another party accused of infringement.”). In view of the lack of any valid privilege and the relevance of such documents, IP Nav should be ordered to produce all documents identified in its privilege log as being protected by “408.”

III. IP Nav Has Not Offered Any Facts To Substantiate Any Alleged Undue Burden.

IP Nav’s sole basis for claiming undue burden is its contention that “any relevant, non-privileged agreements, communications, and other information” exchanged between Walker Digital and IP Nav or between Walker Digital and third parties “should be sought from Walker Digital.”⁷ See Letter from IP Nav to Google of Sept. 7, 2012 at 1 [App. 0353]. IP Navigation has presented no other reason or any facts to support its contention that producing the requested documents over which it has failed to show the existence of any valid privilege (which consist of approximately 1200 pages) would be unduly burdensome.

To determine whether a subpoena presents an undue burden, the Fifth Circuit considers the following factors: “(1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.” See *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004)

⁷ The fact that Google is also attempting to resolve the issues with Walker Digital in the underlying litigation in Delaware cannot be the basis for IP Nav’s refusal to comply with a valid subpoena from the Northern District of Texas. See, e.g., *Software Rights Archive, LLC v. Google Inc.*, 2009 WL 1438249, at *2 (D. Del. May 21, 2009) (no absolute rule prohibiting party seeking to obtain same documents from non-party as can be obtained from a party; furthermore, “where a party requests documents from a non-party that are likely to be in the possession of an opposing party, production of documents is appropriate where those documents constitute a non-well-defined set whose completeness is not readily verifiable”).

(reversing quashing of subpoena and denial of motion to compel); *accord Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers*, 2010 U.S. Dist. LEXIS 4123, at *8-10 (D. Md. Jan. 12, 2012) (refusing to quash subpoena where respondent put forth only “broad assertions” of undue burden). The limited time period, scope, and even the quantity of the documents at issue is clear from the requests in the subpoena and IP Nav’s improper privilege log. In view of the circumstances set forth above, including the fact that Walker Digital identified IP Nav as the entity responsible for settlement negotiations with defendants and potential licensees and the fact that Walker Digital has yet to produce any such documents in discovery, such as prior art, infringement contentions, claim charts, the need and relevance of these documents is evident. IP Nav’s vague, unsubstantiated “undue burden” objection should therefore be overruled.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court issue an order compelling IP Nav to fully comply with the June 13, 2012 Subpoena Duces Tecum and produce all responsive documents in its possession, custody, or control and to provide an adequate privilege log for any documents properly withheld on the grounds of attorney-client privilege or work product doctrine.

Dated: September 17, 2012

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document was served on the following counsel on September 17, 2012 via first class mail and electronic mail.

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