IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | |
|---|---|
| ROSETTA STONE, LTD, Plaintiff, | Civil No. 09-736 |
| VS. | February 19, 2010 |
| GOOGLE, INC., Defendant. | |

MOTIONS HEARING

BEFORE: THE HONORABLE THERESA C. BUCHANAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: SKADDEN ARPS SLATE MEAGHER & FLOM
BY: WARREN THOMAS ALLEN, II, ESQ.
JENNIFER SPAZIANO, ESQ.

FOR THE DEFENDANT: QUINN, EMANUEL, URQUHART, OLIVER
BY: MARGRET M. CARUSO, ESQ.
ODIN, FELDMAN & PITTLEMAN
JONATHAN FRIEDEN, ESQ.

---

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON,RMR,CRR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314

(Thereupon, the following was heard in open court at 9:57 a.m.)

THE CLERK: Rosetta Stone versus Google, civil action number 09CV736.

THE COURT: Good morning.

Would you all identify yourself for the record, please.

MR. ALLEN: Good morning, Your Honor. Warren Allen for plaintiff respondent, Rosetta Stone --

THE COURT: Good morning.

MR. ALLEN: -- along with Jennifer Spaziano. Jennifer Spaziano will be arguing today.

THE COURT: All right. In the back, Google.

Good morning.

MS. CARUSO: Good morning, Your Honor. Margaret Caruso, Quinn Emanuel for Google, Inc. And with me is Jonathan Frieden.

THE COURT: All right. This is on the defendant's motion for protective order to preclude the depositions, and I've read the memoranda.

Do you have anything to add to your motion?

MS. CARUSO: Yes, Your Honor, just a few things. One is that I didn't have the chance to respond to the briefing of the plaintiffs, but I did provide them yesterday with declarations of Alana Karen and Baris

Gultekin. Those are two Google employees who represent that they were very involved in the trademark policy changes of 2004-2009, that they along with Rose Hagan are the people with the most knowledge about those policies.

All of those three witnesses are going to be deposed or on the schedule to be deposed in this case, and with the Court's permission I would hand this up.

THE COURT: All right.

MS. CARUSO: I also note that the plaintiff takes the position that unique personal -- unique knowledge is not required in order to depose a CEO or a top-ranked executive of the company right off the bat in discovery.

And if the Court were to accept that standard, it would be a stunning departure from nationwide law. It would make this district very hostile to corporations because based on the plaintiff's reasoning, as long as the CEO or the other top-ranking executive president had been copied on an e-mail that was addressed to many other people or had approved a policy and undisputably (sic), we're here about policies that were approved, that would provide sufficient justification to take that CEO's deposition.

And if it were to happen, for Google alone, Google's involved in about 80 cases right now, just

dealing with patent, copyright and trademark issues, and if Google's top three executives could be deposed in every one of those cases where willfulness is an issue, then that's what they would spend their time doing and they would not be running the company.

I also would like to point out it's very interesting that they attached the deposition of Larry Page that was taken in the *American Blind* case because that deposition makes clear how very limited his knowledge was. He repeatedly says he doesn't know what the details of the trademark policy were. But what they really point to about that testimony is a statement that they say reflects his commentary on what became the 2009 trademark policy, what was implemented as the 2009 trademark policy of Google.

And I want to clarify for Your Honor that that is not what became the 2009 trademark policy of Google. The 2009 trademark policy of Google does not allow competitors to use a trademark of another of their competitor in the text of their ads.

And what it does allow is for resellers to use that. So, for example, Amazon can say I'm offering Rosetta Stone products or companies that manufacture replacement parts or offer service on that particular thing.

I'll pull out a copy of the policy as it exists right now. It's available on Google's website.

THE COURT: You know, I think it might be helpful if I heard from plaintiff's counsel next and then I'll come back to you if I have any questions. All right. Thank you.

Did you have anything to add to your opposition?

MS. SPAZIANO: I do, Your Honor. First starting with the declarations that were submitted, the declarations are from the individuals who claim to have the most knowledge about these policies.

Alana Karen with respect to the 2004 policy basically says that she has the most knowledge of the details of how the policy was changed, options that were considered and the reasons for that change.

What she doesn't say is the knowledge that she has regarding why the decision was made to implement the policy, notwithstanding its known risks. And that's the information that executives are going to have.

She also does not say that the individuals whose depositions we're seeking do not have personal knowledge of the policies underlying this case. She says that they do not have unique knowledge.

The second declaration is from Baris

Gultekin. I'm not sure how it's pronounced, and he says basically the same thing with respect to the 2009 trademark policy, that he's the person most knowledgeable.

He doesn't say that he's the person most knowledgeable with respect to why the decision was made and the risk factors that were considered by the company in making the decision, but basically says the same thing as Ms. Karen does that they're the person most knowledgeable.

And what's happening here is Google is basically trying to tell us what discovery we can take. And they're trying to say that this case is about the trademark policies and the development of the policies and in part, it is, and that's why we wanted to depose these individuals. But it's also about the willfulness of the company in deciding to embark on a policy that the company recognized could lead to lawsuits regarding the trademark --

THE COURT: Well, what is it that you think that you're going to get out of the cofounders and the CEO of Google that you wouldn't be able to get out of a 30(b)(6) deposition or depositions of other employees such as those who've submitted the declarations?

MS. SPAZIANO: Why the decision was made, how the company decided that it would change its policy in

2004, notwithstanding the risks associated with that policy.

THE COURT: Why do you think that they would have this knowledge as opposed to the other employees?

MS. SPAZIANO: The -- first of all, there is suggestion in the *American Blind* pleadings that we've submitted to the Court that Rose Hagan who is referenced in Google's pleadings and who they've agreed to make available to us, had a deposition in that case where she said that the 2004 decision -- the 2004 trademark policy was implemented as a result of some concerns that Larry Page had. And so we'd like to explore with Larry Page what concerns he had and how they were resolved by that policy.

This case turns in part on willfulness and the company's affirmative decision to embark on this policy, and 30(b)(6) witnesses are not going able to tell why it was that the company decided to do this and what it was that the individuals who actually made that decision, what they considered when they decided to move forward.

Also, the deposition testimony from Larry Page that is under seal so I won't describe it in any kind of detail here, but he suggests in that deposition that the practices that were agreed upon in 2009 could be confusing.

And while I recognize the stated policy that was implemented in 2009, Mr. Page's views that the use of marks in advertisements could be confusing in 2007 certainly is relevant to whether they, in fact, are confusing in 2009, whether they're from competitors, whether they're from pirates, whether they're from somebody else.

If Mr. Page thought in 2007 that it could be confusing to use names in ads, certainly that's relevant to the question whether they are confusing today. And Mr. Page's understanding and thoughts with respect to that in 2007 is relevant to his willfulness in allowing the policy to be implemented in 2009.

So, that's the kind of information that these individuals have. We have reason to believe that Mr. Page was involved in minute details with respect to how the policies were implemented and again because of the confidentialities I won't be specific as to them but they are in our pleadings. And it's obvious that these gentlemen are involved in the day-to-day decisions for the company.

They have publicly announced in 2004 that they are going to continue to run the company. They -- let me see if I've got the most recent quote from them where they basically say that they are integrally involved

in the day-to-day management of the company.

These are not individuals who are not involved in this. And I think, Your Honor, that's why we don't have declarations from them.

In all of the cases that Google cites in its pleadings, the Court has declarations -- and I shouldn't say all of them because there are a couple of exceptions. But in most of the cases, the individuals sought to be deposed submit declarations to the Court can say I don't have personal knowledge of this. This is a case for wrongful discharge, and I don't know this person. I don't know why this person was terminated, and I have no personal knowledge of the matter.

Here these individuals can't say that. They do have personal knowledge. Mr. Page testified as much in his 2007 deposition. And he doesn't testify that he doesn't have knowledge of what happened with respect to the implementation of the policy in 2004. He testifies that he doesn't remember.

Throughout that deposition transcript, you'll see I don't remember, I don't remember, I don't remember.

THE COURT: And what you makes think that you're going to get any better information out of him this time?

MS. SPAZIANO: Well couple of things, number one, we have documents that we think we could use to refresh his recollection that we've seen. You know, we shouldn't be bound by what other counsel did in 2007. Maybe we could take a better deposition and can try to elicit more information from him.

Number two, it's one of the reasons that we'd like to talk to the other individuals. These individuals tell the public that they make all the decisions jointly. So, if Mr. Page didn't remember things in 2007, perhaps Mr. Schmidt does, or perhaps Mr. Brin does. That's why we want to talk to all of them because he's obviously got some recollection issues as suggested by his deposition transcript. Maybe the other gentlemen recollect their conversations better than he does.

But we also think that we're also entitled to explore with him 2009. And the 2007 deposition doesn't speak to the policy change in 2009, and it doesn't speak to this issue of confusion that's raised by his transcript in 2007.

THE COURT: All right, thank you.

You know, I've reviewed everything here and the Court's always loath to allow a party to depose the CPO -- CEO of a big corporation unless there's reason to think that that executive may have some specific

knowledge.

And, in this case, I think that there is no reason to think that the cofounders and the CEO of Google would have any substantive knowledge as to this decision.

I think quite frankly that the Page deposition illustrates more that Mr. Page didn't have substantial involvement, rather than -- that he had any kind of unique knowledge.

When I'm looking at the size of this corporation versus the cases that you've cited, the plaintiffs cited in their opposition, I have to tell you that with all due respect, there's a huge difference between the responsibilities and the size of a corporation of the CEO such as Google and that of the CEO of Long and Foster or even Rosetta Stone.

And so I find that there is no indication that these corporate officers, these three corporate officers had any knowledge that is unique or that is necessary to be discovered in -- through deposition or that cannot be most importantly obtained by other means. And in this case, it seems to me that your best information is going to come from the persons who you were set to depose, the ones who submitted the declaration and any others that you're going to encounter in the 30(b)(6) deposition. You can always come back and after you've

finished all of your depositions if you find that there's something that's lacking and you have knowledge, if you have specific indications that the only people who would know this are the CEO and the cofounders of Google, then by all means bring your motion back, but I doubt that would be the case. So, the motion is granted.

(Proceeding concluded at 10:11 a.m.)

CERTIFICATE OF TRANSCRIPTION

I, Renecia Wilson, hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

IN WITNESS WHEREOF, I have hereto subscribed my name this 26th day of April , 2010.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter