UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC. Plaintiff, v. AOL, INC., *et al.*, Defendants.	Civil Action No. 2:11-cv-512

OPPOSITION BRIEF TO PLAINTIFF'S MOTION FOR LEAVE TO TAKE 30(B)(1) DEPOSITIONS OF DEFENDANTS

I. INTRODUCTION

The default rule under the Federal Rules of Civil Procedure is ten depositions per side. Plaintiff insisted early in this case that it would need more than ten depositions given the number of defendants. On February 9, 2012, after lengthy negotiations on this point, Defendants proposed the following compromise:

> The parties agree that Plaintiff shall have the right to a Rule 30(b)(6) deposition on liability issues lasting no longer than 7 hours, a Rule 30(b)(6) deposition on damages issues lasting no longer than 7 hours; and the right to depose each fact witness affiliated with a defendant and who has been disclosed pursuant to Rule 26(a) (currently 14 individuals for all defendants). Defendants have agreed to this expansion of the deposition limitations under the Federal Rules of Civil Procedure with the express understanding that this will be substantially all the depositions that plaintiff will take; any additional depositions by plaintiff must be by leave of Court on motion for good cause shown.

This was similar to a proposal that Plaintiff made the day before, which also provided Plaintiff with "the right to depose each fact witness affiliated with a defendant and who has been

disclosed pursuant to Rule 26(a)." Plaintiff responded to Defendants' proposal saying, "this is fine, thanks." There can be no dispute that the parties reached agreement on this issue, as Plaintiff itself concedes when referring to the "agreement between the parties made in February" on depositions. (Br., 3.) Thus, contrary to Plaintiff's statement in its brief, the number of Rule 30(b)(1) depositions that Plaintiff may take is not a "remaining sticking point," as to which the parties had not reached agreement. Rather, Plaintiff's motion is an effort to depart from what the parties had already agreed.

Plaintiff provides no legitimate basis to depart from the parties' agreement. Rather, Plaintiff largely ignores it. Indeed, Plaintiff does not even recite the agreement in its motion. Nor does Plaintiff identify a single witness not in the Defendants' initial disclosures that it supposedly needs to depose to justify abandoning the parties' agreement—an agreement based on Plaintiff's own proposal. Plaintiff's unsupported request for unidentified depositions beyond the parties' agreement should be rejected.

II. BACKGROUND

A. Defendants Agreed to Plaintiff's Requested Deposition Limits to Avoid Motion Practice.

The parties began discussing deposition limits in late 2011. On December 19, although the parties had not yet reached agreement, Defendants represented the following to Plaintiff:

> [I]n order to demonstrate that Defendants intend to proceed in a good faith and reasonable manner regarding depositions, Defendants can represent that they would not object, on the basis of it being over the 10 deposition limit, should Plaintiff seek one Rule 30(b)(6) deposition of reasonable scope (e.g. 7 hrs) for each Defendant and to depose the witnesses currently on each Defendants initial disclosures (many of which would likely be Rule 30(b)(6) designees). However, Defendants reserve their right to raise the 10 deposition limit in the federal rules as to these witnesses and others, should Plaintiff seek to depose additional witnesses (i.e. if Plaintiff seeks 5 individual depositions of IAC witnesses not in the initial disclosures).

(Declaration of Jennifer Ghaussy ("Ghaussy Decl.") Ex. A, 2 (emphasis added).) Several weeks later, during a meet and confer on January 27, 2012, Plaintiff insisted that it needed to move the Court for leave to take additional depositions. Defendants replied that they believed a motion should not be necessary regarding this hypothetical dispute, pointing to their representation quoted above. (*Id.*)

Plaintiff stated this representation was insufficient and that "[w]e believe that a motion seeking to modify the federal rules is necessary." (*Id.*) Plaintiff then asked whether Defendants would agree to the following deposition limits:

- one 30(b)(6) deposition on liability issues for each defendant,
- one 30(b)(6) deposition on damages issues for each defendant, and
- 30(b)(1) depositions equal to the number of individuals that each defendant disclosed in its Rule 26(a)(1) disclosures as individuals likely to have discoverable information,

(*Id.*) This is essentially what Plaintiff now asks the Court to order.[1] However, Defendants did not agree to this proposal. (*Id.*, 1.)

Plaintiff then made another proposal. It suggested that it would only take Rule 30(b)(1) depositions of those individuals disclosed in Defendants' disclosures:

> The parties agree that Plaintiff shall have the right to a Rule 30(b)(6) deposition on liability issues, a Rule 30(b)(6) deposition on damages issues; and the right to depose each fact witness affiliated with a defendants and who has been disclosed pursuant to Rule 26(a) (currently 14 individuals for all defendants).

(Ghaussy Decl. Ex. B, 3 (emphasis added).) In response, Defendants incorporated similar language (quoted above in the Introduction) as a compromise. (*Id.*, 1.) Defendants, however, added "that Defendants have agreed to this expansion of the deposition limitations under the

[1] For Target, however, Plaintiff seeks two depositions as opposed to the one individual disclosed. For IAC, Plaintiff now seeks two depositions as opposed to three, and for AOL Plaintiff seeks three depositions as opposed to five.

Federal Rules of Civil Procedure with the express understanding that this will be substantially all the depositions that plaintiff will take; any additional depositions by plaintiff must be by leave of Court on motion for good cause shown." Plaintiff responded "this is fine," and the parties proceeded according to the agreement. (*Id.*)

B. Plaintiff Seeks To Renege On The Parties' Agreement.

On May 11, 2012, Plaintiff sought a deposition of a Google witness who was not identified in the parties' initial disclosures. (Ghaussy Decl. Ex. C.) After Defendants pointed out the parties' agreement, the parties engaged in extensive back and forth to attempt to resolve the issue. (*Id.* Exs. D-K.) When the parties were unable to resolve the issue, Plaintiff contacted the Court to set up a hearing, at which the briefing schedule was set for Plaintiff's instant motion.

In its motion, Plaintiff suggests that Defendants have not engaged with Plaintiff in good faith subsequent to the hearing. (Br., 3.) This is demonstrably false. Initially, as has become a pattern in the parties' negotiations, Plaintiff's attempts to resolve the issue have consisted mainly of repeating its prior proposals. (Ghaussy Decl. Ex. L; Ex. M, 2; Ex. N, 2.) Further, Plaintiff steadfastly refused to tell Defendants what further depositions they sought beyond the individuals listed in the initial disclosures. As Defendants made clear to Plaintiff, Defendants could not provide any counterproposals without even knowing what further discovery Plaintiff wanted. (*Id.* Ex. M, 1.) Yet, even in its motion, Plaintiff still does not identify what additional individual witnesses it wants to depose beyond those in Defendants' disclosures.

Plaintiff's allegations of bad faith ring hollow, particularly given that, on the day it filed its motion, Plaintiff admitted that it never had any intention of complying with the parties' agreement. On June 25, Plaintiff informed Defendants that "[i]t was never our intent to be limited to deposing only those persons that Defendants identify for us." (*Id.* Ex. N, 2.) Yet, this was precisely what Plaintiff itself proposed in February. Again, it was Plaintiff that initially

proposed Plaintiff be limited to deposing witnesses disclosed pursuant to Rule 26(a). And to avoid motion practice, Defendants accepted this compromise, which Plaintiff now seeks to ignore.

III. LEGAL STANDARD

Rule 30 provides "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2), if the parties have not stipulated to the deposition and (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants." F.R.C.P. 30(a)(2)(A)(i). While Rule 26 does allow alteration of the discovery limits, parties should nonetheless be held to agreements made regarding discovery limits. *See Regal Coal, Inc. v. LaRosa*, 2006 WL 696181, *25 (N.D.W.Va. Mar. 17, 2006) (quashing subpoena that court found was "discovery prohibited by the parties' agreement").

In good faith, Defendants agreed to a compromise proposed by the Plaintiff that expanded discovery rights and has relied upon that compromise to conduct discovery to date. Now, after the fact, Plaintiff seeks to renegotiate the compromise without good reason and to Defendants' prejudice. Plaintiff's motion should be denied.

IV. PLAINTIFF FAILS TO JUSTIFY ITS REFUSAL TO ABIDE BY THE PARTIES' AGREEMENT, OR EXPLAIN WHY THE COURT SHOULD NOT ENFORCE THAT AGREEMENT.

The Court should uphold the parties' agreement concerning deposition limits. As detailed above, the record makes clear the parties' agreement—that Plaintiff had "the right to depose each fact witness affiliated with a defendant and who has been disclosed pursuant to Rule 26(a)." (Ghaussy Decl. Ex. B, 1.) Plaintiff does not dispute this in its motion. Instead, Plaintiff ignores the agreement (other than to acknowledge in passing that it exists), and fails to provide a single valid reason why this Court should ignore it too. (Br., 3.)

Plaintiff incorrectly argues that Defendants are trying to "restrict" the depositions Plaintiff may take pursuant to the parties' agreement. But, as detailed above, it was Plaintiff that initially suggested it be limited to taking personal depositions of the individuals named in Defendants' initial disclosures. And in agreeing to do so, Plaintiff explicitly acknowledged that this was an "expansion of the deposition limitations under the Federal Rules of Civil Procedure," and that any further depositions "must be by leave of Court on motion for good cause shown." (Ghaussy Decl. Ex. B, 1.)

Plaintiff has not met that good cause standard. Should Plaintiff's motion be granted, it will be allowed to take 22 depositions of the Defendants (the eight depositions already taken, the two depositions of AOL that it has noticed but not yet taken, and 12 additional individual depositions). Plaintiff fails to point to any specific facts or information that it needs to justify taking 12 more depositions of Defendants than provided in Federal Rule of Civil Procedure 30, or to explain why the benefit to Plaintiff from taking all of these additional depositions outweighs the burden imposed on Defendants. Critically, Plaintiff has failed to identify even a single witness that it needs to depose who is not covered by the parties' agreement. Although Plaintiff argues that "Defendants identified numerous other individuals during their 30(b)(6) depositions last week—significantly, many of whom were not identified in Defendants' Initial Disclosures," Plaintiff does not name these individuals or state what information it wants from them that could not have been obtained from the 30(b)(6) deponents or the witnesses listed in the Initial Disclosures. (Br., 2.) Given that opening expert reports are due on July 18, if Plaintiff genuinely needed additional depositions, it should have been able to point specifically to the individuals whose testimony it supposedly needs or to the information it seeks.

Instead, Plaintiff resorts to arguments based upon generalizations about the case. First, Plaintiff argues additional depositions are necessary given the number of parties in the case and the complex nature of a patent case. But Plaintiff knew these facts when it struck its deal.

Second, Plaintiff argues it needs extra depositions of Google because the other Defendants testified that Google is the only entity with knowledge of the accused systems. (Br., 3 fn1). But Plaintiff has already deposed Jonathan Alferness, one of Google's 30(b)(6) witnesses on liability and damages issues, for nearly ten hours on the technical aspects of the accused systems.[2] Furthermore, Defendants pointed out multiple times prior to the depositions that "it would be Google's witnesses, not witnesses for the other defendants, who would be the witnesses with knowledge regarding this issue." (*Id.* Ex. O, 2; Ex. P, 3.) To avoid wasting time, Defendants even offered to make Google's witnesses available first, and even provided written statements that the other defendants lacked this knowledge. (*Id.*, 2; Ghaussy Decl. Exs. Q-V.) Plaintiff, however, insisted on deposing Defendants on these topics, and on taking these depositions prior to Google's deposition. (*Id.* Ex. W.) Thus, Plaintiff cannot now be heard to complain that it needs further depositions because the non-Google Defendants were not knowledgeable about issues relevant to the case.

In addition, given that it cannot point to any specific deponents and the clear reasons justifying the need to depose the particular individual, Plaintiff's request is premature and seeks a ruling on a hypothetical.

[2] Despite Mr. Alferness' extensive technical knowledge of the accused systems, Plaintiff failed to even cite to his deposition in the July 2 Court-ordered supplementation of its infringement contentions, suggesting that these depositions have little import to Plaintiff in any event. (Ghaussy Decl. ¶ 21.)

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion should be summarily denied.[3]

DATED: July 5, 2012

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[3] Defendants submit that, especially given that Plaintiff has already been heard on this issue and given that Plaintiff has done nothing to demonstrate it needs the relief it seeks or that the circumstances justify abandoning the parties' agreement concerning deposition numbers, it would be a waste of resources for both the Court and Defendants to have a further hearing on Plaintiff's motion.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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