

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.

Plaintiff,

v.

Civil Action No. 2:11-cv-512

AOL INC., *et al.*,

Defendants.

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S
DEPOSITION DESIGNATIONS**

This Court's Scheduling Order requires that the parties exchange Rule 26(a)(3) pretrial deposition designations by September 19, 2012, and to exchange objections and counter-designations by September 26, 2012. (D.N. 90, ¶ 5.) Plaintiff's designations are so overbroad that they effectively provide no notice of what it intends to show to the jury, and make it extremely difficult for Defendants to meaningfully review them for objections. In many cases, virtually an entire deposition is designated. Having vastly over-designated, Plaintiff's approach will leave everything to the last minute. Plaintiff will be forced to winnow its designations during trial, and Defendants will have to counter-designate at that time as well.¹ Disputes on the designations will then have to be presented to the Court on an expedited basis during trial. To

¹ Given Defendant's proper designations, late counter-designation is a burden that only Defendant's will suffer.

make the deposition designations a pretrial, rather than a during trial process, Defendants seek an order striking Plaintiff's current designations or requiring Plaintiff to designate at this time what it truly intends to play to the jury.

Fed. R. Civ. P. 26(a)(3)(A)(ii) requires the disclosure of "the designation of those witnesses whose testimony the party expects to present by deposition." (emphasis added). Plaintiff has not done so. Plaintiff cannot legitimately expect to present testimony from twelve witnesses constituting what appears to be more than fourteen hours of testimony. (*See* Declaration of Emily O'Brien in Support of Defendants' Motion to Strike Deposition Designations ("O'Brien Dec."), Ex. 1 (Ex. A to Pl.'s Initial Pretrial Disclosure).) For some of these deponents, including Bartholomew Furrow, Gary Holt, and Nicholas Fox, Plaintiff designated the vast majority of the deponents' deposition transcripts. (*See id.*)

Plaintiff acknowledges that deposition designations are meant to give the other party notice of the testimony that Plaintiff may play at trial or that its experts may rely upon. (O'Brien Dec., Ex. 2, 4 ("Plaintiff's deposition designations were made in good faith and with the intention of placing Defendants on notice of testimony that plaintiff may play at trial or on which plaintiff's expert might rely.")) Plaintiff's designations, however, are unreasonable, overbroad, and do not meaningfully inform Defendants about which portions of deposition testimony Plaintiff may play at trial or which portions Plaintiff's experts may rely upon. Indeed, even Plaintiff does not contend that it will seek to play all or even close to all of these designations for the jury. When asked about the over-designation, Plaintiff merely contends that it is not required to limit its designations at this stage in the case. (*Id.*) But Plaintiff, who goes first, should know what evidence it intends to rely on at trial which begins in less than two weeks. And Defendants are entitled to have a meaningful identification of that evidence.

To attempt to resolve the issue without burdening the Court, Defendants have repeatedly requested that Plaintiff narrow its deposition designations; Plaintiff has refused each time. (*See* O'Brien Dec., Ex. 2.) As a compromise, Defendants requested that Plaintiff identify the witnesses it intends to call at trial by deposition testimony and to *only* narrow the designations of that subset at this time; Plaintiff again refused. (*Id.*, 3.) Defendants suggested that Plaintiff focus on the five most important witnesses and at least narrow those designations at this point, so that Defendants can properly object and counter-designate. (O'Brien Dec., ¶ 4.) Plaintiff again refused. (*Id.*)

Plaintiff has, instead, proposed that the parties agree to delay the exchange of narrowed deposition designations until 72 hours prior to their use at trial.² The parties would then serve objections and counter-designations to that testimony, and then meet and confer to finalize the deposition testimony that would be played at trial. (O'Brien Dec., Ex. 2, 4.) While Defendants are agreeable to some narrowing and exchange process prior to trial, this proposal is not tenable given the extensive over-designation by Plaintiff. Plaintiff's proposal seeks to delay resolving the designations until the parties are under the pressure and heavy workload of trial rather than attempting in good faith to resolve the issues now, defeating the purpose of Fed. R. Civ. P.

² Plaintiff's position as contained in its October 5 email is essentially that this procedure moots their responsibility to meaningfully designate deposition testimony in this matter. (O'Brien Dec., Ex. 3.) Plaintiff argues that it need not comply with the rules because: "(1) The parties have agreed on a procedure to narrow deposition designations, as stated in the agreed pretrial order. Plaintiff will follow this agreed-to schedule even if the motions in limine are still pending, although subsequent rulings may require further alterations of deposition designations. (2) Defendants never have requested that plaintiff do anything other than withdraw an unspecified volume of deposition designations. In the absence of a specific request, there are no established positions to define an impasse. (3) I/P Engine has offered to withdraw the majority of its deposition designations if Defendants would stipulate to the facts of the operation of the Adwords system as stated in Defendants' expert report. Defendants have inexplicably refused." For the reasons above and for the sake of a meaningful, final pretrial order, Plaintiff should be required to provide appropriate deposition designations immediately.

26(a)(3). Plaintiff's proposal has the serious likelihood of disrupting trial during Plaintiff's case for rulings on objections and counter-designations as Plaintiff's designations are almost certainly going to be a moving target. Furthermore, since Defendants' designations are already focused enough to give Plaintiff notice of the testimony Defendants may rely on at trial, the burden of Plaintiff's proposal will fall almost entirely on Defendants.

Rather than delaying the resolution of deposition designations until right before or during trial, Defendants respectfully request this Court grant Defendants' Motion to Strike Plaintiff's Deposition Designations and, either strike these designations with prejudice or strike them and require Plaintiff to provide a set of narrow deposition designations that accurately reflect the testimony they intend to present at trial, within 24 hours of the Court's Order.

DATED: October 5, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 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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