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Attorneys for Defendants
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual,

Plaintiff,

vs.

MATTHEW KATZER, an individual, and KAMIND ASSOCIATES, INC., an Oregon corporation dba KAM Industries,

Defendants.

Case Number C06-1905-JSW-JL

Place: Ct. F, 15th Floor

Hon. James Larson
Time: July 8, 2009 9:30am

DEFENDANTS MATTHEW KATZER AND KAMIND ASSOCIATES, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR A DISCOVERY PLAN

STATEMENT OF THE ISSUES TO BE DECIDED

1. Is Plaintiff entitled to significantly more depositions than allowed under Fed. R. Civ. P. 30(a)(2)?
2. Is Plaintiff entitled to propound more ten (10) more interrogatories than allowed under Fed. R. Civ. P. 33(a)?
3. Is Plaintiff entitled to expand the scope of discovery to irrelevant information?

STATEMENT OF THE RELEVANT FACTS

This Court entered a discovery plan on May 14, 2009 [Dkt.# 302] after holding a third Case Management Conference. The parties commenced discovery on May 14, 2009. The close of non-expert discovery is October 5, 2009. At this time, no depositions have been taken and Plaintiff has propounded fourteen (14) interrogatories and twenty-eight (28) requests for production to Defendants. Contrary to Plaintiff's contention, this case does not involve any patent issues, as all of Plaintiff's patent claims were dismissed without leave to amend on January 5, 2009 by this Court [Dkt.# 284].

On May 26, 2009, Plaintiff filed a "Motion for Leave for Discovery Plan and Motion to Shorten Time" [Dkt.# 303]. One of the many motions in this document is a motion to shorten Defendants' time to respond. Plaintiff did not confer with Defendants on this motion as required by Civ. L.R. 6-3 (a)(4)(i) nor did Plaintiff did submit a declaration outlining the reasons for the requested shortening or the prejudice that would occur if time was not changed. Civ. L.R. 6-3(a)(1)-(5). On May 29, 2009, Plaintiff filed a second "Motion for a Discovery Plan" [Dkt.# 305]. The second Motion for a Discovery Plan purports to "replace" the first motion and the only substantive difference appears to be that Plaintiff has removed the motion to shorten time. Motion for a Discovery Plan at 2, fn. 1. Subsequent to the filing of this second motion, the parties stipulated to an expedited schedule for this motion. Plaintiff's motion is presently noticed for July 8, 2009, however Defendants do not object to an expedited hearing on June 17, 2009 for

this motion. [Dkt.# 307]. Defendants will address only the motions contained in Plaintiff's Second Motion for a Discovery Plan (hereinafter "Motion for a Discovery Plan").

ARGUMENT

Plaintiff's Motion for a Discovery Plan is actually three motions: (1) a motion for leave to take over 100 additional depositions; (2) a motion for leave to propound ten (10) additional interrogatories; and (3) a motion to expand the scope of discovery beyond what is relevant to this lawsuit.

1. Additional Depositions

At this time, Plaintiff has yet to conduct any depositions. Plaintiff seeks to replace the limit in Fed. R. Civ. P. 30 of ten (10) depositions limited to one day of seven (7) hours each with "100 hours of depositions."

Ostensibly this would allow Plaintiff to conduct over 100 mini-depositions of the legion of 60 developers and 50 manufacturers that Plaintiff feels he needs to depose. *See* Motion for Discovery Plan at 3 (stating that testimony may be needed from 60 developers and 50 manufacturers and that these depositions will last less than 30 minutes each). Plaintiff's counsel has indicated to the undersigned that she intends to depose all of the approximately 60 developers who assigned their rights to Plaintiff.

Plaintiff's motion is unaccompanied by a declaration and fails to make any showing why extra depositions are necessary as required by the Federal Rules. *See Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minn.*, 187 F.R.D. 578, 586 (D. Minn. 1999) (stating that parties must make a "particularized showing" why extra depositions are necessary and stating that "at a minimum, [Defendant] should appropriately exhaust its current quota of depositions, in order to make an informed request for an opportunity to depose more witnesses…"). *See also Robertson v. Bair*, 242 F.R.D. 130, 138 (D.D.C. 2007) (noting that the Court begins with the presumption that the limits on depositions in the Federal Rules were "carefully chosen and that extensions of that limit should be the exception, not the rule.").

Additionally, Plaintiff fails entirely to demonstrate why the benefit of taking over 100 depositions outweighs the burden and expense of this undertaking given the needs of the case, the amount in controversy, the parties' resources, and the importance of the additional depositions in resolving the issues as required by the Federal Rules. Fed. R. Civ. P. 26(b)(2)(C)(iii); *see also* Fed. R. Civ. P. 26(b)(1) noting that all discovery is subject to the limitations in Fed. R. Civ. P. 26(b)(2)(C), *accord*, Adv. Comm. Notes on 1993 Amendments to FRCP 30(a)(2) stating that more than 10 depositions per side should be allowed only when consistent with the "benefits vs. burdens" approach of Rule 26(b)(2).

The extreme number of depositions requested by Plaintiff would be tremendously burdensome on Defendants, are vastly disproportionate to the amount in controversy in this case and are of limited relevance. Defendants' gross sales of the software which is the subject of Plaintiff's copyright claim in this lawsuit are approximately $1,200.00. Decl. of Matthew A. Katzer [Dkt.# 261] ¶ 23. Therefore, Defendants respectfully request that this Court not deviate from the deposition limitations in the Federal Rules.

2. Interrogatories

Plaintiff seeks ten (10) additional interrogatories. Plaintiff has yet to ask his allotted 25 interrogatories to Defendants and has presently only propounded 14 interrogatories to Defendants. As with Plaintiff's request for additional depositions, Plaintiff must make a particularized showing of why these additional interrogatories are necessary when he seeks to serve more interrogatories than contemplated by the Federal Rules. *Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minn.*, 187 F.R.D. at 586. Again, Plaintiff has failed to make any showing why it is necessary to deviate from the Federal Rules.

Additionally, Plaintiff has also failed to comply with Civ. L.R. 33-3 failing to attach a "memorandum which sets forth each proposed additional interrogatory and explains in detail why it is necessary to propound the additional questions" to his motion.[1]

Therefore, Defendants request that this Court deny Plaintiff's motion to propound additional interrogatories.

3. Motion to Expand the Scope of Discovery beyond what is Relevant

Plaintiff's motion also seeks to expand the scope of discovery to "any issues relating to credibility" and "any other issues that the parties may inquire into under the circumstances of the case." Motion for a Discovery Plan at 4 and Proposed Order. Neither parties' "credibility" is related to any claim, defense or subject matter of this copyright and cyber-squatting lawsuit and is therefore irrelevant to this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Additionally, Plaintiff's second clause (cited above) is so vague and broad that it would encompass virtually anything and would therefore also lead to discovery requests that are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Therefore, Defendants respectfully request that this Court deny Plaintiff's motion to expand the scope of discovery to information that is not relevant to this litigation.

CONCLUSION

Based on the above, Defendants respectfully requests that Plaintiff's Motion for Discovery Plan be denied in its entirety. Defendants believe this Plaintiff's motion can be decided on the written submissions and therefore a hearing on this motion is unnecessary.

[1] This is not the first time that Plaintiff has refused to comply with this Court's local rules. On December, 11, 2007, Judge White warned Plaintiff and his counsel, in writing, that "failure to abide by the rules of this Court in the future will result in substantial sanctions against one or both of them." Order re Outstanding Motions, page 4 [Dkt.# 190].

Dated: June 4, 2009.

Respectfully submitted,

/s/ Scott Jerger

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CERTIFICATE OF SERVICE

I certify that on June 4, 2009 I served Matthew Katzer's and KAM's Response to Plaintiff's Motion for Discovery Plan on the following parties through their attorneys via the Court's ECF filing system:

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/s Scott Jerger

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