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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT JACOBSEN, Plaintiff, v. MATTHEW KATZER, et al., Defendants.	No. C-06-1905-JSW **PLAINTIFF ROBERT JACOBSEN'S MOTION FOR DISCOVERY PLAN AND MOTION TO SHORTEN TIME** Courtroom: F, 15th Floor Judge: Hon. James Larson

I. Introduction

Plaintiff Robert Jacobsen seeks an order relating to a discovery plan. This order would make changes relating to interrogatories and depositions, and define the subjects for discovery.

II. Procedure

This case involves patents, copyright, trademark and DMCA issues relating to open source software and model trains.

After Defendants answered in February 2009, Jacobsen filed an administrative motion for a status conference. This status conference was to set dates for Rule 26(a) updates, a Rule 26(f) discovery conference between counsel, and a Rule 16 conference. The district court granted the motion, and set the status conference hearing for May 1, 2009. At the May 1 hearing, the district court told Jacobsen that that day was the Rule 16 conference, and that it would set all pretrial dates then, without a discovery plan. The district court stated that if the parties wanted a discovery plan, they could raise the matter with the discovery magistrate judge. The district court stated that discovery would open May 4, 2009 and close in early October 2009. The parties have never met and conferred as required by Rule 26(f).

After leaving the May 1 hearing, Jacobsen's counsel learned of her grandfather's death earlier that morning. She was in New Mexico through the end of the following week. Upon her return, Katzer's counsel also had a death in the family. Afterward, the parties' counsel began negotiations over a protective order and a discovery plan. They have been unable to agree on the discovery plan. Jacobsen files this motion for a discovery order.

In the meantime, the parties have exchanged their first set of discovery requests. Jacobsen sent his first discovery request on May 5, 2009. Defendants sent their first discovery request on May 11, 2009.

On a related note, Jacobsen has determined that he has well over 1 million documents that may be responsive to Katzer's discovery requests, and may have several hundred thousand emails that are responsive. The parties are negotiating limits on document production, but Jacobsen still expects that between 1 million and 2 million pages will be produced, possibly more.

III. Facts

Jacobsen, the plaintiff, is the owner and assignee of JMRI software. Katzer and KAMIND,

the defendants, are competitors. Jacobsen added a copyright infringement claim after learning that Katzer and KAMIND had converting JMRI files into a format to use with KAMIND software. Jacobsen registered some versions after learning about the initial infringement. Because Katzer and KAMIND engaged in a different type of infringement after Jacobsen registered his works, Jacobsen may be eligible for statutory damages. Later versions were registered within the 3-month period and may also be eligible for statutory damages. However, depending on the facts, Jacobsen might not be eligible for statutory damages. He thus needs to establish another damages theory—value of use—to obtain more than nominal damages.

Approximately 60 developers assigned their rights to Jacobsen. They can offer key testimony on the amount of time they spent developing the files that Katzer and KAMIND converted. Their testimony may also be needed on other issues relating to the software. Their testimony is expected to be brief, probably not longer than 30 minutes per developer.

Jacobsen may also need to take testimony from decoder manufacturers. Jacobsen estimates that there are approximately 50 manufacturers. Again, Jacobsen expects testimony from the majority of manufacturers to be brief.

IV. Argument

Pursuant to Federal Rules of Civil Procedure 26(f), Jacobsen moves for an order adjusting discovery. He requests the number of interrogatories be increased from 25 to 35. To obtain testimony from developers and also, possibly decoder manufacturers, Jacobsen requests that, instead of 10 depositions of 7 hours maximum each, the parties each have 100 hours of depositions. Katzer and KAMIND oppose this request.

Given the potential size of the document production, Jacobsen believes that the scope of discovery should be limited. Katzer and KAMIND disagree. On the one hand, Katzer and KAMIND state that they oppose an increase or alteration in the depositions because "[Katzer and KAMIND] don't find this particular case very fact intensive". On the other hand, they wish to seek discovery on any and all issues that they are entitled to seek discovery on. While the parties have agreed to exclude from production any documents that relate solely to the patent declaratory

judgment causes of action, further limitation would simplify discovery and make it cost less. For these reasons, Jacobsen moves for alterations in the discovery plan to limit the issues to Jacobsen's copyright infringement, DMCA, and cybersquatting claim, and Katzer and KAMIND's copyright infringement claim, damages and equitable relief arising from these claims, any issues relating to credibility, and any other issues that the parties may inquire into under the circumstances of the case. In the alternative, Jacobsen asks the Court to order the parties to meet and confer, as required by Rule 26(f), and submit a discovery plan to the Court.

Because of the time-sensitive nature of this matter, Jacobsen moves to shorten time for responses, with Defendants to file any Opposition by Tuesday, June 2, 2009, and Jacobsen to reply by Friday, June 5, 2009. Jacobsen asks the Court to set a hearing for 9 a.m. Weds., June 10, 2009.

V. Conclusion

Jacobsen respectfully asks the Court to increase the number of interrogatories to 35, and alter the depositions so that each side has 100 hours. He asks the Court to limit discovery as described above. He also asks the Court to shorten time to respond to this motion and to set a hearing, if needed in this matter, for 9 a.m. Weds., June 10, 2009.

Respectfully submitted,

DATED: May 26, 2009

By /s/

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