

PRK ENTERPRISES INC. and KLEIN INVESTMENTS, INC.,	§	IN THE DISTRICT COURT OF
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	JEFFERSON COUNTY
	§	
GOOGLE INC., et. al,	§	
	§	
Defendants.	§	172nd JUDICIAL DISTRICT

**GOOGLE INC.’S MOTION FOR PROTECTIVE ORDER  
AND MOTION TO QUASH**

Pursuant to the Texas Rules of Civil Procedure, Google Inc. (“Google”) files this motion for protective order and motion to quash, and respectfully states:

**FACTUAL AND PROCEDURAL BACKGROUND**

1. **The Rule 202 Petition.** This case involves a petition for pre-suit discovery under Rule 202 of the Texas Rules of Civil Procedure. Specifically, Petitioners PRK Enterprises, Inc. and Klein Investments, Inc. (together, “Petitioners” or “Klein”) filed this matter seeking to discover information from Google regarding two website blogs, [www.operationkleinwatch.blogspot.com](http://www.operationkleinwatch.blogspot.com) and [www.samtheeagleusa.blogspot.com](http://www.samtheeagleusa.blogspot.com) (the “Blogs”). See Exhibit A. In their Original Rule 202 Petition (the “202 Petition”), Petitioners sought to determine who “owns” or “hosts” these Blogs and, in this connection, requested the oral deposition of a corporate representative of Google on four specific topics. See Exhibit A at 3-4.

2. **The First Rule 11 Agreement.** Upon service of the 202 Petition, the undersigned counsel for Google contacted Klein’s counsel to discuss the most efficient

way to proceed with this matter. Instead of Klein conducting an oral deposition of Google to obtain the information related to the Blogs, Google agreed to a procedure whereby it would provide Klein with certain documents.<sup>1</sup> To memorialize the agreed-upon procedure, Klein and Google entered into a Rule 11 agreement dated October 1, 2009 (the “First Rule 11 Agreement”). *See* Exhibit B. Under the First Rule 11 Agreement, Google agreed to accept service of a subpoena duces tecum (“Subpoena”) identifying the four categories outlined in the 202 Petition. *Id.* at 1. Klein and Google agreed that the deadline for objections and responses to the Subpoena would be twenty (20) days after Google received the Subpoena. *Id.*

**3. The Motion to Quash by the Blogs.** In accordance with the First Rule 11 Agreement, Klein served Google with a Subpoena on October 2, 2009, and Google provided notice to the Blogs.<sup>2</sup> Prior to the expiration of the twenty (20) day deadline for Google to respond to the Subpoena, the Blogs, as the interested parties, filed a motion to quash the Subpoena (the “Motion to Quash”). In their Motion to Quash, the Blogs argued that the disclosure of the information requested by Klein in the Subpoena and the underlying Rule 202 Petition would violate their First Amendment rights. *See* Exhibit C. In light of the Motion to Quash, Google specifically noted in responding to the Subpoena that, until the Court decided the Motion to Quash in favor of Klein, and there was no successful appeal of the Court’s ruling, Google would not provide any documents

---

<sup>1</sup> Rule 202 of the Texas Rules of Civil Procedure does not provide a vehicle by which a party may obtain documents in a pre-lawsuit proceeding.

<sup>2</sup> In violation of the First Rule 11 Agreement, the Subpoena goes beyond the four specific categories listed in the 202 Petition.

responsive to the Subpoena. *See* Exhibit D at 3, ¶ 3. This approach makes complete sense (and, as discussed below, Klein agreed by entering into a second Rule 11 agreement) since the First Amendment issues must be addressed before Google provides any identifying information with respect to the Blogs.

**4. Klein’s Response to the Motion to Quash.** On December 23, 2009, approximately two (2) months after the Blogs filed the Motion to Quash, Klein filed a response. Klein also “teed up” the issues raised in the Motion to Quash by setting the matter for hearing on January 15, 2010. Google did not, and does not, take any position with respect to the First Amendment issues raised in the Motion to Quash.

**5. The Second Rule 11 Agreement.** Upon receiving notice of the hearing on the Motion to Quash, Google’s counsel again contacted Klein’s counsel to discuss the current status and the best way to proceed. Those discussions led to a second Rule 11 Agreement dated January 6, 2010 (the “Second Rule 11 Agreement”). *See* Exhibit E. In the Second Rule 11 Agreement, Klein and Google specifically addressed the scope of the hearing on the Motion to Quash and the most orderly way to proceed. In this regard, the Second Rule 11 Agreement provides in relevant part:

The [hearing on January 15, 2010] will address the issues raised in the bloggers’ motion to quash Plaintiffs’ subpoena (the “Subpoena”) issued to [Google]. It is my understanding and our agreement that the Hearing will only address the issues raised in the motion to quash. More specifically, the Hearing is not intended to, and you will not address either at the Hearing or in the subsequent Order evidencing the ruling(s) at the Hearing, any of Google’s underlying objections to the Subpoena.

As we discussed, if Plaintiffs are successful in defeating the motion to quash **and there is no successful appeal of that ruling**, Google will provide Plaintiffs with documents responsive to the Subpoena, subject to its objections. After Google provides its documents, you will contact me to discuss any additional information required by the Subpoena and the propriety of Google's objections to the Subpoena. If the need arises, a hearing at a later date will be scheduled to address any additional information requested by the Subpoena and Google's objections to the Subpoena.

*See* Exhibit E at 3 (emphasis added). In sum, the Second Rule 11 Agreement outlines an orderly process for resolving this matter – completely address the First Amendment issues raised in the Motion to Quash prior to Google providing the identifying information requested by Klein in the Subpoena.

**6. The Court's Ruling on the Motion to Quash.** By Order dated January 29, 2010, the Court denied the Motion to Quash filed by the Blogs. *See* Exhibit F.

**7. The Notice of Appeal.** After receiving notice of the Court's ruling, the Blogs, as the "interested parties," filed a Notice of Appeal. *See* Exhibit G. The Ninth District Court of Appeals docketed the Blogs' appeal and assigned the appeal case number 09-10-00051- cv. *See* Exhibit H. The Blogs' appeal is still pending.<sup>3</sup>

**8. Klein's Response to the Appeal.** Rather than first address the Blogs' appeal, Klein has now attempted to (a) short circuit the appellate court's jurisdiction and (b) renege on the prior Rule 11 agreements with Google. In this regard, and on February 26, 2010, Klein filed "Petitioners' First Amended Petition." *See* Exhibit I. In the First

---

<sup>3</sup> It should be noted that only the Blogs are listed as appellants in the Ninth District Court of Appeals, not Google. *See* Exhibit H. This is entirely consistent with Google's approach throughout this entire matter -- Google takes no position as to the propriety of the First Amendment issues raised by the Blogs.

Amended Petition, Klein repeats everything contained in the Rule 202 Petition, but adds a paragraph (numbered 13) purporting to sue Google for civil conspiracy, slander, and libel. *Id.* at ¶ 13.<sup>4</sup> And, Klein makes the completely unfounded and frivolous allegation that Google has violated the prior Rule 11 agreements “because it is a civil conspirator” with the Blogs. *Id.* In connection with the filing of the First Amended Petition, Klein also served Google with a deposition notice (the Deposition Notice”) and a corresponding document request (the “Document Request”). *See* Exhibit J.<sup>5</sup> The Deposition Notice and Document Request contain the exact same categories of information in the Subpoena, which is currently the subject of the Blogs’ appeal.

### **ARGUMENT AND AUTHORITIES**

**9. Protective Order and Motion to Quash.** Pursuant to Rules 11, 176.6(d), 176.6(e), 192.6(a), and 199.4, Google requests that the Court enter a protective order and quash the Deposition Notice and Document Request. As discussed above, the Blogs have appealed the Court’s ruling on the First Amendment issues raised in their Motion to Quash. That appeal is currently pending. Again, Google takes no position with respect to the First Amendment issues raised by the Blogs, but respectfully submits that, consistent with the Second Rule 11 Agreement, these issues must be finally resolved prior to Google providing information to Klein. If Google were to attend the currently-

---

<sup>4</sup> The fact that Klein has asserted affirmative claims in this Rule 202 proceeding is completely inconsistent with the procedures outlined in Tex. R. Civ. P. 202, which governs pre-lawsuit petitions for discovery to investigate potential litigation.

<sup>5</sup> Klein did not confer with Google prior to filing the First Amended Petition or serving the Deposition Notice and Document Request, although Google’s counsel has informed Klein’s counsel that the production of any information in response to the Subpoena is improper (and inconsistent with the Rule 11 agreements) while the appeal is pending.

noticed deposition and provide information in response to the Document Request prior to a decision on the appeal, it would eviscerate the issue currently in front of the Ninth District Court of Appeals. This result would be improper.

Further, the previous Rule 11 agreements make it clear that Google will provide Klein with certain documents responsive to the Subpoena if the appeal by the Blogs is unsuccessful. A deposition of Google at this time is inappropriate and unnecessary; in fact, proceeding with a deposition prior to Google providing Klein with documents responsive to the Subpoena, subject to its objections, is in violation of the parties' Rule 11 agreements. Klein should adhere to these agreements, and first address the Blogs' appeal before pressing for the information from Google. If Klein defeats the appeal, Google will, as previously agreed, provide Klein with certain documents responsive to the Subpoena, subject to its objections.

Additionally, the Document Request is procedurally defective. In this regard, Rule 199.2(b)(5) makes it clear that a request for production of documents contained in a deposition notice must comply with Rule 196, including the 30-day deadline for responses. *See* Tex. R. Civ. P. 199.2(b)(5) and Rule 199, cmt. 1. The Document Request does not provide for the required 30-day response time. Since the Document Request fails to comply with the applicable Texas Rules of Civil Procedure, it should also be quashed on this procedural basis.<sup>6</sup>

---

<sup>6</sup> In an abundance of caution and since the Document Request is identical to the requests in the Subpoena, Google hereby incorporates by reference its responses and objections to the Subpoena (*see* Exhibit D) in responding to the Document Request.

**10. Objection to Time and Place of Deposition.** Google specifically objects to the time and place for the corporate representative deposition contained in the Deposition Notice. With respect to the timing, and as explained above, the deposition of Google should not occur until at least after (1) the appeal filed by the Blogs is finally decided, (2) assuming the Blogs are unsuccessful in their appeal, Google provides Klein with its initial documents, (3) if Klein requires more information from Google, the underlying objections of Google to the Subpoena are resolved, and (4) if Google's objections to the Subpoena are overruled, Google provides Klein with additional information. The first order of business, however, must be the Blogs' appeal pending in the Ninth Court of Appeals, which is what Klein and Google previously agreed.

Even if a deposition of Google is eventually required, Google also objects to the deposition occurring in Beaumont, Texas at the office of Klein's counsel. Google is located in Mountain View, California, and any deposition of its corporate representative should occur where the witness works and resides. Alternatively, and at the very least, the deposition should occur in Dallas, Texas, where Google's counsel is located.

### **CONCLUSION**

For all the reasons addressed herein, Google respectfully requests that the Court grant the motion, enter a protective order in favor of Google and quash the Deposition Notice and the Document Request, award Google its reasonable and necessary attorney's fees, costs, and expenses in bringing this motion, and provide Google with such other and further relief, at law and in equity, to which Google may show itself justly entitled.

Respectfully Submitted,

/s/ Dennis M. Lynch

Dennis M. Lynch  
State Bar No. 90001506

FIGARI & DAVENPORT, LLP  
3400 Bank of America Plaza  
901 Main Street, LB 125  
Dallas, TX 75202-3796  
Phone (214) 939-2000  
Facsimile (214) 939-2090

ATTORNEYS FOR DEFENDANT  
GOOGLE INC.

**CERTIFICATE OF SERVICE**

I hereby certify on the 3rd day of March, 2010, a true and correct copy of the foregoing document has been sent via certified mail, return receipt requested to the following counsel of record:

Mr. John S. Morgan  
Harris, Duesler & Hatfield  
550 Fannin,, Suite 650  
Beaumont, Texas 77701

A true and correct copy of the foregoing document has also been sent to Sam the Eagle Webblog and Operation Kleinwatch Webblog, the appellants in the Ninth District Court of Appeals.

/s/ Dennis M. Lynch

Dennis M. Lynch