



STRATTON LAW & MEDIATION

INTELLECTUAL PROPERTY LAW & TECHNOLOGY RELATED MATTERS

WHY DISCOVERY IS EXPENSIVE – *a not so hypothetical letter to opposing counsel*

In Re: *Doe Company v. Jane Corporation*
Western District of Washington Civil Cause No. 2009:CV 1
Our File No. DC 01.L01

Dear Counsel:

Thank you for your most recent letter. It is apparent that the parties are viewing the factual context of this litigation differently. Your client's settlement offer, while thoughtful, is rejected.

I do not know if you have obtained copies of the relevant court files, but our judge has set a fairly tight time frame for the completion of the Rule 26(f) conference. Our initial disclosures are due in thirty days and our Joint Status Report is to be filed in forty-five days. As required, a copy of the Judge's Scheduling Order regarding discovery and Rule 26(f) procedures are attached.

In preparation for the Rule 26(f) conference, I like to set forth our thinking on the initial disclosures that are required under Rule 26(a)(1). Mutual disclosures are more useful if you and I can exchange views prior to having the Rule 26(f) meeting of counsel. With that in mind, let me outline some of the information that we are going to be looking to Jane Corporation to provide under Rule 26, which should be provided in the first instance in TIFF format and prepared for inclusion in our Summation database.

(a) **Rule 26(a)(1)(A)** concerns names, addresses and telephone numbers of individuals likely to have discoverable information. Because this lawsuit is directed toward copyright infringement, we will want the names, addresses and telephone numbers of the officers and directors of Jane Corporation and of each employee or agent (whether deemed to be an independent contractor or not) who has knowledge of the preparation of the advertisements that are the subject matter of this litigation and/or who will be supporting any affirmative defense. We will also want the names, addresses and telephone numbers of any third party with whom any communication occurred with respect to creation, preparation and placement of the accused infringing advertisement. The same will apply to prior "event" advertising.

(b) **Rule 26(a)(1)(B)** looks to documents, data and compilations. In this regard, we expect Jane Corporation to be identifying and producing all documents, as broadly defined, that refer, reflect or in any way relate to the accused infringing advertisement and the sales of all units by Jane Corporation that occurred during the advertised period, the two years before the advertised period, and any prior "event" advertising and documents that support any affirmative defense. We will also want to view any personnel records or files relating to the employees who worked during the relevant time periods. Because Jane Corporation has raised, as

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a defense, the employment agreement with one of its employees, we will want to review all employment/commission agreements with sales personnel for the past five years.

We will also want produced any email communications that refer, reflect, or in any way relate to the preparation of the proposed event and the advertised event that appeared. In this regard, we will expect to have access to any computer, server or network, and any stand alone hard drives that Jane Corporation claims to have used to create either or both of the advertisements and any prior “event” advertising and any sales events. We will also expect identification of all computer operating systems and application programs used by Jane Corporation for the creation of any advertisements and the data files associated with those programs, whether or not claimed by Jane Corporation to have been used in the preparation of the accused works. Likewise, we will expect access to any computer used in the past to create advertising works. Finally, please describe and be prepared to grant access to any printer used by Jane Corporation for the creation of advertisements whether used by Jane Corporation or others. Finally, please provide in native format all electronic documents that otherwise refer, reflect or in any relate to the accused advertisement or the sale of any products arising during or after the advertised event.

(c) **Rule 26(a)(1)(C)** addresses damages. Realizing that damages to the plaintiff in any copyright suit are difficult to assess at the outset, until the scope of the likely infringement is known, we will expect disclosure of all product sales records, including customer lists, and all financial records of Jane Corporation for the past five (5) years, and all tax returns, both state and federal, financial statements, and internal management accounting reports for the same period time. These records will include any sale event in the nature of the sale that occurred in the last five year period.

(d) **Rule 26(a)(1)(D)** requires the production of any insurance agreement which may be called upon to satisfy any judgment. We would appreciate a copy of all insurance policies of Jane Corporation and Mr. and Mrs. Jane, including CGL coverage and homeowners insurance.

The information requested is a starting point and is in no way exhaustive of the list of disclosures we expect to receive pursuant to Rule 26(f). We trust this letter will assist you when reviewing your client’s discoverable information and preparing for our Rule 26(f) conference.

I realize that time is short for us to complete our initial disclosures and prepare a Joint Status Report, and I will be available at your convenience to work with you to meet these Court-imposed deadlines.

Sincerely,

STRATTON LAW & MEDIATION P.S.

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