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Non-parties Advance Voice Recognition Systems, Inc. (“AVRS”), Douglas Holt (“Mr. Holt”), Michael K. Davis (“Mr. Davis”), and Joseph Miglietta (“Mr. Miglietta”) (collectively, the “AVRS Non-Parties”), pursuant to Fed. R. Civ. P. 26(c) and 45(c), respectfully submit this motion for protective order to limit the scope of discovery sought in subpoenas *duces tecum* and *ad testificandum* issued and served by plaintiff, Allvoice Developments US, LLC (“Allvoice”) (the “Allvoice subpoenas”) and defendant, Microsoft Corporation (“Microsoft”) (the “Microsoft subpoenas”).

I. INTRODUCTION

Microsoft asserts that Allvoice’s ‘273 patent-in-suit is invalid, in relevant part, based on: (1) a commercial product called “Digital Dictate” that was developed and sold by the AVRS Non-Parties more than one year prior to the filing date of the ‘273 patent and (2) U.S. Patent No. 5,960,447 (the “‘447 patent”), which discloses the broad invention of which the Digital Dictate product was one embodiment. Non-parties Messrs. Holt, Davis, and Miglietta are the named inventors of the ‘447 patent, and AVRS presently owns the ‘447 patent. Both Microsoft and Allvoice have served the AVRS Non-Parties with multiple subpoenas. Significantly, Microsoft - - the party that bears the burden of proving invalidity -- has agreed to limit the scope of its discovery of the AVRS Non-Parties generally to the prior art at issue--*i.e.*, the Digital Dictate product and the ‘447 patent. Allvoice, on the other hand, refuses to limit the scope of any of its subpoenas.

Most of the information that Allvoice seeks from the AVRS Non-Parties is not relevant to any issue in this case and is not reasonably calculated to lead to the discovery of admissible evidence. Rather than seeking discovery for purposes of the present case, it appears that Allvoice is attempting to use the subpoena power of this Court as a mechanism to obtain

information that could be useful to it in a different litigation -- an interference currently ongoing between it and AVRS before the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office (“the Board”).

To the extent that the issues in the interference are also relevant to issues in this litigation, the AVRS Non-Parties do not object to providing discovery on such subjects. But Allvoice’s discovery requests are not so limited. Allvoice should not be allowed to use the subpoena power of this Court to obtain information that: (1) is only relevant, if at all, to the interference; (2) imposes an undue burden and expense on non-parties; (3) seeks expert testimony from fact witnesses; and (4) attempts to circumvent a ruling in the interference denying Allvoice’s request to take depositions of these same non-parties. Allvoice’s attempt to take discovery here for use in a different proceeding also violates paragraph 38 of the Court’s Stipulated Protective Order (D.I. 48). Accordingly, the AVRS Non-Parties respectfully move for a protective order limiting the scope of Allvoice’s and Microsoft’s discovery of them.

II. BACKGROUND

A. The AVRS Prior Art

In 1993, NCC, Inc. (“NCC”), a predecessor of non-party AVRS, was formed to develop, market, and sell Digital Dictate. Declaration of Michael K. Davis (Davis Decl.), para 2. In November 1994, NCC publicly demonstrated and offered for sale a first version of Digital Dictate. *Id.*, para. 3. In late 1994, NCC began selling the first version of Digital Dictate. *Id.*, para. 4. In March 1995, NCC first shipped the first version of Digital Dictate to a paying customer. *Id.*, para. 5. In early 1995, NCC began offering for sale a second version of Digital Dictate. *Id.*, para. 6. In June 1995, NCC first shipped the second version of Digital Dictate to a paying customer. *Id.*, para. 7. On November 13, 1995, NCC filed a patent application

disclosing and claiming the broad invention of which both the first and second versions of Digital Dictate were embodiments. *Id.*, para. 8. Messrs. Holt, Davis, and Miglietta are the named inventors on the ‘447 patent. *Id.*, para. 9. Non-party AVRS presently owns the ‘447 patent. *Id.*, para. 10.

B. The Interference With Allvoice

On July 12, 1999, NCC filed U.S. application serial number 09/351,542 (the “‘542 application”), which is a continuation of the application that matured into the ‘447 patent. Declaration of Michael E. McCabe, Jr. (McCabe Decl.), Ex. A.¹ On February 25, 2010, the PTO issued a notice of allowability of the claims pending in the ‘542 application. *Id.*, Ex. B. On March 9, 2010, the Board declared an interference between the allowed claims in the ‘542 application (*i.e.*, “Holt”) and certain of the claims in Allvoice’s ‘273 patent (*i.e.*, “Mitchell”). *Id.*, Ex. C. That interference was assigned to Administrative Patent Judge (“APJ”) Sally Medley. *See Id.*

On April 26-27, 2010, AVRS and Allvoice submitted to Judge Medley their respective lists of proposed motions (that is, lists of motions that they each wanted to file in the current (first) phase of the Interference). *Id.*, Ex. D.² On May 4, 2010, Judge Medley ruled on the parties’ proposed motions. *Id.*, Ex. E. In relevant part, she authorized Allvoice to file motions for judgments that the claims of the ‘542 application are unpatentable³ because they fail to meet the written description, enablement, and definiteness requirements of 35 U.S.C. § 112. *Id.*, Ex. E

¹ For purposes of brevity, only the Fee Transmittal page is being submitted herewith.

² Only Allvoice’s list of proposed motions is being submitted herewith.

³ In the interference, the issue is the patentability of the parties’ claims, not their validity, and the burden of proof imposed on each party is preponderance of the evidence. In contrast, in this infringement litigation, the comparable issue is validity, and the burden of proof on Microsoft is clear-and-convincing evidence.

at 2. Allvoice also had sought, in its list of proposed motions, permission to file a motion for judgment that the claims in the '542 application are unpatentable for inequitable conduct. *Id.*, Ex. D at 14-15. Judge Medley deferred that request to a subsequent phase of the interference. *Id.*, Ex. E at 3. Allvoice had also sought permission to take the depositions of Messrs. Holt, Miglietta, Davis, and patent prosecution counsel (Lee Meyer) regarding, among other things, its assertions that the claims in the '542 application are unpatentable and that their allowance was procured through inequitable conduct. *Id.*, Ex. D at 13-14. Judge Medley denied that request outright. *Id.*, Ex. E at 3.

C. Microsoft's Invalidity Contentions

Allvoice alleges in the present suit that Microsoft infringes certain of the claims in the '273 patent. On March 25, 2010, Microsoft filed its Local Patent Rule 3-3 Invalidity Contentions (D.I. 56-5). In relevant part, Microsoft asserted that the Digital Dictate product shown and sold in the 1994-1996 time period and/or the '447 patent anticipates the allegedly infringed claims in the '273 patent. *See Id.*

D. The Present Discovery Dispute

1. The Allvoice subpoenas

On April 9, 2010, Allvoice served the AVRS Non-Parties collectively with a total of seven subpoenas *duces tecum* and *ad testificandum*. Four of Allvoice's subpoenas requested, from each of the respective AVRS Non-Parties, simultaneous document productions and appearances at Rule 31 depositions on April 26, 2010. *Id.*, Ex F.⁴ The remaining three subpoenas included the identical document requests as the first four subpoenas, but they additionally demanded that Messrs. Holt and Miglietta and AVRS appear for Rule 30 depositions

⁴ On April 21, 2010, Allvoice agreed to cancel the Rule 31 depositions.

on May 10, 11, and 13, respectively. *Id.*, Ex. G. On April 22, 2010, the AVRS Non-Parties served objections to the seven Allvoice subpoenas. *Id.*, Ex. H.⁵ As discussed below, the parties (including Microsoft) agreed to delay depositions until June 2010.

2. The Microsoft subpoenas

On April 28, 2010, Microsoft served each of the AVRS Non-Parties with subpoenas *duces tecum* and *ad testificandum*. *Id.*, Ex. I. The Microsoft subpoenas incorporated by reference the document requests and Rule 30(b)(6) topics that were included in the corresponding Allvoice subpoenas.⁶ *See, e.g., Id.*, Ex. I at pp. 5-6. The Microsoft subpoenas called for document productions and Rule 30 depositions of the AVRS Non-Parties between June 21 through June 24, 2010. *Id.* On May 5, 2010, the AVRS Non-Parties served their objections to the Microsoft subpoenas. *Id.*, Ex. J.⁷

3. Meet and confer between the parties

Counsel for the AVRS Non-Parties objected to the scope of the multiple, overlapping subpoenas. In particular, AVRS's counsel asserted that many of the document requests and corresponding Rule 30(b)(6) subjects included in the parties' subpoenas have no relevance at all to the issues in the present litigation, were unduly burdensome, or called for expert testimony. *See, e.g., Id.*, Ex. J, *passim*.

⁵ Given the substantially duplicative nature of the Allvoice subpoenas, only one of the non-parties objections (Mr. Holt's) is being submitted herewith. Mr. Holt's objections are representative of the other non-parties objections.

⁶ The Microsoft subpoenas also included additional document requests and Rule 30(b)(6) topics that were not included in the Allvoice subpoenas.

⁷ Given the substantially duplicative nature of the Microsoft subpoenas, only one of the non-parties objections (AVRS) is being submitted herewith. AVRS's objections are representative of the objections raised by the other non-parties.

On May 11, 2010, counsel for the AVRS Non-Parties proposed: (1) to make Mr. Davis available on July 21, 2010 for up to seven hours for an individual/Rule 30(b)(6) deposition on Topics 1-4 of Allvoice's subpoena; (2) to make Mr. Holt available for a personal deposition on June 28, 2010 for up to seven hours; and (3) to make a corporate designee (Ms. Jakowchuk) available on the afternoon of June 29, 2010, for no more than four hours, on certain other Rule 30(b)(6) topics. *See Id.*, Ex. K (May 11, 2010 email).⁸ This proposal was made subject to the AVRS Non-Parties previously stated objections. *Id.*

Rather than agreeing to narrow the subjects of the depositions, counsel for Allvoice, on May 13, 2010, advised AVRS's counsel that Allvoice was going to broaden the Rule 30(b)(6) subpoena of AVRS to include four new topics (Topics 15-18).⁹ *Id.*, Ex. K (May 13, 2010 email). Additionally, Allvoice stated that the deposition of Ms. Jakowchuk would be for up to seven hours.

On May 17, 2010, the parties met and conferred regarding the discovery issues, and in particular, the breadth of the discovery requests, their relevance to the issues in this litigation, and whether it was necessary to have a Rule 30(b)(6) corporate deposition on any of the topics in light of the fact that Messrs. Holt and Davis would have the most relevant information relating to the Digital Dictate product and the conception and reduction to practice of the '447 patent. During that conference, counsel for Microsoft agreed with the AVRS Non-Parties that it would limit the scope of its discovery to what is set forth in Topics 1-4 of Allvoice's Rule 30(b)(6)

⁸ For purposes of brevity, only a portion of the e-mail chain is being submitted herewith.

⁹ As of the present date, Allvoice has not served AVRS with an amended Rule 30(b)(6) subpoena.

subpoena. *See Id.*, Ex. L.¹⁰ Counsel for Allvoice, however, would not agree to limit its discovery to only those subjects. *Id.*

4. Categories of objectionable discovery at issue

The subjects of discovery that are presently in dispute can be classified in four categories:

Category 1 - Discovery relating to the validity or enforceability of the claims of the '447 patent and/or to the patentability of the claims of the '542 application; the PTO prosecution of the '447 patent and the '542 application; and the interference (insofar as it relates to alleged invalidity of the claims in the '447 patent and/or to the alleged unpatentability of the claims in the '542 application). *See* McCabe Decl., Ex. G (Allvoice 30(b)(6) Topics 5 and 14).¹¹

Category 2 - Discovery relating to the past or present ownership, assignments, licenses, or purchases of the '447 patent and/or the '542 application. *See* McCabe Decl., Ex. G (Allvoice 30(b)(6) Topics 10, 11, 12,) and Ex. K (Topics 15 and 16).

Category 3 - Discovery relating to AVRS's or its predecessors' formation, officers, directors, investors, or shareholders. *See* McCabe Decl., Ex. G (Allvoice 30(b)(6) Topic 13) and Ex. K (Topics 17 and 18).

Category 4 - Discovery relating to AVRS's communications with Microsoft or Allvoice. *See* McCabe Decl., Ex. G (Allvoice 30(b)(6) Topics 6-9) and Ex. K (Topic 16).

III. LEGAL STANDARD

Fed. R. Civ. P. 26(b)(1) defines the general scope of discovery and the threshold requirement that discovery must be relevant. The relevancy requirement applies regardless of whether the discovery is sought from a party or a non-party. It is axiomatic that relevancy is defined by the claims or defenses alleged in the pleadings. Of course, to meet the relevancy

¹⁰Microsoft stated that it would reserve the right to take discovery on additional subjects to the extent that Allvoice is allowed by the Court to take discovery on those other subjects. *Id.*, Ex. L.

¹¹ References herein to the subjects in Allvoice's Rule 30(b)(6) deposition notice are for convenience only. The AVRS Non-Parties are not limiting their objections to those topics solely in the context of a Rule 30(b)(6) deposition. The AVRS Non-Parties seek a protective order on those objected-to subjects generally, regardless of whether the subjects are raised in connection with testimony that they may provide in their individual capacity or in their capacity as a corporate representative of AVRS.

standard, the information sought need not be admissible at trial, but it must, at the very least, be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

Fed. R. Civ. P. 26(b)(2) sets additional limits on discovery. Those limits also apply regardless of whether the source of discovery is a party. Rule 26(b)(2)(C) provides in pertinent part that “[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed . . . if it determines that:

- (i) the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

A subpoena may be “facially overbroad” if, among other things, it “covers an unreasonable time period” or it “extends to documents or materials of limited or no relevance to the action.” 9 *Moore’s Federal Practice*, §45.32 at 45-65, 66 (3d Ed. 2010). Furthermore, if “material sought by subpoena is readily available, either from a party to the action or from a public source, obtaining it through subpoena on a nonparty witness often will create an undue burden.” *Id.*, §45.32 at 45-67

Fed. R. Civ. 26(c) authorizes “any person from whom discovery is sought” to move for a protective order in the district where the action is pending. The district court may, for good cause shown, issue an order to protect “a person from annoyance, embarrassment, oppression, or undue burden or expense.” Among other things, the court may enter an order “forbidding

disclosure or discovery”, Fed. R. Civ. P. 26(c)(A), or “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.” Fed. R. Civ. P. 26(c)(D).¹²

IV. ARGUMENT

A. The Validity, Enforceability, And Prosecution History Of The Claims of The ‘447 Patent And the Patentability And Prosecution History Of The Claims In The ‘542 Application Are Not Relevant, And The Requested Discovery Is Unduly Burdensome And Seeks Expert And Legal Testimony

As set forth in Category 1, Allvoice seeks discovery from the AVRS Non-Parties concerning *inter alia* the preparation and prosecution of the application that matured into the ‘447 patent and the ‘542 application and the substance of examiner interviews during those prosecutions. Neither Allvoice nor Microsoft should be permitted to inquire into these topics. Multiple reasons support a protective order regarding the Category 1 topics.

First, these topics are not relevant to the claims or defenses in this case. The only issue that is relevant (insofar as it relates to the AVRS Non-Parties) is Microsoft’s defense that the involved claims of Allvoice’s ‘273 patent are invalid based upon the ‘447 patent and the Digital Dictate product. However, the validity or enforceability of the involved claims of the ‘447 patent and the patentability of the claims of the ‘542 application have nothing whatsoever to do with whether the ‘273 patent is invalid, unenforceable, or infringed. Furthermore, the preparation of the application that led to the issuance of the ‘447 patent is not relevant to any

¹² Fed. R. Civ. P. 45 provides additional protections for non-parties. Under Rule 45(c)(1), an attorney responsible for issuing a subpoena “must take reasonable steps to avoid imposing undue burden and expense on a person subject to the subpoena.” Indeed, an issuing court “must” quash or modify a subpoena that subjects a person to “undue burden.” Fed. R. Civ. P. 45(c)(3)(A)(iv). It is axiomatic that what applies to the protection of parties applies in spades to the protection of non-parties. *See, e.g.*, Fed. R. Civ. P. 45, Advisory Committee Note of 1991 (“A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court.”).

issue in this case. Thus, the Category 1 discovery is not reasonably calculated to lead to the discovery of admissible evidence.

Second, the prosecution history of the '447 patent and '542 application have, in total, extended over a period of 14 years. Allvoice has already obtained from the Board in the interference an official copy of the file histories, and AVRS has already voluntarily provided a copy of those file histories to Microsoft. The parties and their respective experts thus know already what has occurred during the prosecution. It imposes an undue burden and expense to require the individual inventors, or an AVRS corporate representative, to testify regarding the history or the contents of the patent prosecution files or the substance of examiner interviews. To the extent that such information is needed, it is available in the documents that are contained in the file histories.

Third, whether the involved claims in the '447 patent are valid or enforceable and whether the claims in the '542 application are patentable are the subject of expert testimony. For example, if it is allowed to do so in this case, Allvoice would undoubtedly try to obtain inventor testimony concerning the meaning or scope of the claims of the '447 patent or the '542 application and whether or how those claims are supported by the specifications (which are identical) of that patent and that application. Those subjects are plainly the province of expert testimony. The inventors are fact witnesses.¹³ Messrs. Holt, Davis, and Miglietta have not been engaged by either party as experts in this case. Accordingly, it would be improper to require them to provide, in effect, expert or opinion testimony on issues such as claim interpretation,

¹³ While inventor testimony is sometimes allowed for the purpose of claim construction, that would only be appropriate if an issue in this case was whether Microsoft infringes any claims in AVRS's patent. Obviously, that is not the case.

Section 112 support, or the application of claims to accused products or other art. That is precisely the type of testimony that Allvoice is seeking, as reflected in the Category 1 Topics.

Fourth, the subjects of Category 1 encompass privileged communications and attorney work product. It imposes an undue burden and expense to have to log such communications on a privilege log, especially given the irrelevance of the prosecution histories to the issues in this case.¹⁴

Fifth, whether the claims in the '542 application are patentable is an issue that Allvoice and AVRS are presently litigating in the interference. Judge Medley has already denied Allvoice's request for depositions of these same inventors on issues relating to the patentability of the claims in the '542 application and the alleged inequitable conduct in connection with the '447 patent and the '542 application. Given that she is not allowing Allvoice to take discovery from those fact witnesses at this time, Allvoice's subpoenas are, in effect, an attempted end run around Judge Medley's decision.

For all of the foregoing reasons, the AVRS Non-Parties request the entry of a Protective Order prohibiting the parties from taking discovery from them on the Category 1 topics.

B. The Past or Present Ownership, Assignments, Licenses, or Purchases of the '447 Patent and the '542 Application are not Relevant

As set forth in Category 2, Allvoice seeks discovery from the AVRS Non-Parties concerning, *inter alia*, the past or present ownership of the '447 patent and the '542 application, as well as assignments, licenses, or purchases of AVRS's intellectual property. None of those

¹⁴Since the information sought is not relevant, the AVRS Non-Parties should not be required to include such information on a privilege log. Nevertheless, in order to avoid an assertion by Allvoice that a failure to log constitutes a waiver of the privilege, counsel for AVRS is preparing a privilege log. AVRS will not, however, log privileged communications that post-date the filing of the present litigation.

issues is relevant to the present litigation, nor would testimony on these subjects be reasonably calculated to lead to the discovery of admissible evidence.

Furthermore, to the extent that Allvoice believes that Microsoft has acquired (or desires to acquire) an “interest” of any kind in either the ‘447 patent or the ‘542 application, that information is readily available from Microsoft. AVRS has already produced to the parties, in response to the subpoenas, all written communications that it has had with Allvoice or Microsoft, respectively. There is no need for further third party discovery from the AVRS Non-Parties, including depositions, and the information that Allvoice seeks can and should be obtained from Microsoft.

For at least the foregoing reason, the AVRS Non-Parties request the entry of a Protective Order prohibiting the parties from taking discovery from them on the Category 2 topics.

C. The Formation of AVRS and its Predecessors and the Identities of Officers, Directors, Investors, and Shareholders are not Relevant

The Category 3 subjects also have no relevance to the issues in this case. Based on Microsoft’s invalidity contentions, relevance should be limited to the conception and reduction to practice of the subject matter defined by the claims of the ‘447 patent and the Digital Dictate product. It makes no difference to the relevant issues in this case who are, or were, the officers, directors, investors, or shareholders of either AVRS or its predecessors. These subjects plainly impose an undue burden on the AVRS Non-Parties and are apparently designed to annoy and harass the AVRS Non-Parties.

For at least the foregoing reason, the AVRS Non-Parties request the entry of a Protective Order prohibiting the parties from taking discovery from them on the Category 3 topics.

D. Communications Between AVRS and either Microsoft or Allvoice is Already in the Possession of the Parties

The Category 4 subjects relate to communications between AVRS and Microsoft. As stated above, AVRS has already produced all written communications that it has had with Allvoice or with Microsoft. There is no need for further third party discovery from them, including depositions, on the substance of those communications. The information that Allvoice seeks can be obtained directly from Microsoft. It imposes an undue burden on the AVRS Non-Parties to provide such information.

For at least the foregoing reason, the AVRS Non-Parties request the entry of a Protective Order prohibiting the parties from taking discovery from them on the Category 4 topics.

E. The Subjects Of The AVRS Non-Party Discovery Should Be Limited To Topics 1-4 Of Allvoice's Rule 30(b)(6) Subpoena

As indicated above, AVRS and Microsoft have agreed on what is a far more reasonable scope of discovery - the subjects set forth in Topics 1-4 of the Allvoice Rule 30(b)(6) subpoena insofar as they relate to activities that occurred in the 1993-1996 time period:

Topic 1 - The conception, reduction to practice, and development of any invention claimed in the involved claims of the '447 patent, including Digital Dictate.

Topics 2 and 3 - Contents of source code, object code, developer notes, and documents regarding conception, reduction to practice, or development of the mirrored embodiment shown in Figure 3 of the '447 patent and similar information relating to the development of the DDANYAPP.DLL.

Topic 4 - The marketing, promotion, licensing, sale, or offer for sale of any product covered by any involved claim in the '447 patent, including Digital Dictate, for the time period prior to 1997.

V. CONCLUSION

AVRS has already produced tens of thousands of documents and computer files. For all the foregoing reasons, the AVRS Non-Parties respectfully request the entry of a Protective Order which affirmatively states that the scope of the AVRS Non-Party discovery is limited as set forth above.

Respectfully submitted,

Michael E. McCabe, Jr. /s/
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CERTIFICATE OF SERVICE

This is to certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 25th day of May, 2010

Michael E. McCabe, Jr. /s/
Michael E. McCabe, Jr.

CERTIFICATE OF CONFERENCE

Counsel have complied with the meet and confer requirement in Local Rule CV-7(h). The motion is opposed by Allvoice and is conditionally unopposed by Microsoft. The personal conference required by the rule was conducted by telephone on May 17, 2010. Counsel for Microsoft Corporation participating in that conference was Paul Torchia and Steven Kalogeras from Weil, Gotshal & Manges LLP. Counsel for Allvoice participating in the conference was Chris Perque from Gardere Wynne Sewell LLP. Counsel for non-parties Advanced Voice Recognition Systems, Inc., Douglas Holt, Michael K. Davis, and Joseph Miglietta participating in the conference was Michael McCabe. Although counsel for Microsoft agreed (subject to a reservation of rights) to limit the scope of its discovery, no such agreement was reached with Allvoice. Accordingly, the discussion has conclusively ended at an impasse over the scope of third party discovery, leaving an open issue for the Court to resolve.

Michael E. McCabe, Jr. /s/
Michael E. McCabe, Jr.