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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)
) Bankruptcy Case
INTERACTIVE NETWORK, INC., a) No. 98-34055DM
California corporation,)
) Chapter 11
Debtor.)
_____)

Order Denying Motion For Protective Order

On January 7, 2000, this court held a hearing on the motion for protective order filed by Interactive Network, Inc. ("Debtor"). In this motion, Debtor seeks an order quashing the deposition subpoenas of Marshall L. Small, Esq. ("Small") and J. Robert Nelson, Esq. ("Nelson"), both of whom are partners at Morrison & Foerster, LLP, the law firm serving as Debtor's general bankruptcy counsel. David R. Lockton ("Lockton"), whose attorneys issued the subpoenas, filed an opposition to Debtor's motion for protective order. Pending resolution of other separate issues relating to stock options claimed by Lockton, the court is temporarily granting the motion with respect to Small. With respect to Nelson, however, the court will deny the motion for

1 protective order.

2 Lockton contends that Nelson is a percipient witness on
3 issues relating to Debtor's objections to his proof of claim. In
4 particular, Lockton wants to depose Nelson regarding (1) Nelson's
5 knowledge of TCI's purported intention to retain ownership of
6 Debtor's patents, an alleged event of default triggering
7 acceleration of amounts due to Lockton; (2) Nelson's conversations
8 with Lockton, upon which Lockton bases his claims of waiver and
9 estoppel by Debtor; (3) Nelson's knowledge regarding the
10 ratification of Lockton's employment agreement by Debtor's board
11 of directors; (4) Nelson's knowledge of and lack of objection to
12 Lockton's compensation arrangement; and (5) Nelson's knowledge of
13 Lockton's services to and activities on behalf of Debtor (which is
14 relevant to reasonableness of Lockton's compensation).

15 Nelson is not litigation, trial or bankruptcy counsel in this
16 contested matter. His services as attorney which are relevant to
17 the proposed discovery were rendered apart from and prior to the
18 claims litigation. Lockton wants to depose Nelson as a fact
19 witness, and concedes that any discovery of Nelson is subject to
20 Debtor's right to claim available privileges. As such, this court
21 will follow the liberal approach to discovery directed at
22 attorneys adopted in Johnston Development Group, Inc. v.
23 Carpenters Local Union No. 1578, 130 F.R.D. 348, 352 (D. N.J.
24 1990) ("deposition of the attorney may be 'both necessary and
25 appropriate' where the attorney may be a fact witness, such as an
26 'actor or viewer', rather than one who 'was not a party to any of
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1 the underlying transactions giving rise to the action'"). Under
2 these circumstances, this court is not inclined to follow Shelton
3 v. America Motors Corp., 805 F.2d 1323 (8th Cir. 1986), which
4 involved an attorney who was not a witness to the underlying
5 transaction and was actual trial counsel.

6 Most significantly, Debtor has refused to stipulate that it
7 will not call Nelson as a fact witness at trial, and has
8 specifically stated that it may call him as a rebuttal witness.
9 In essence, Nelson's testimony may be relevant to the prosecution
10 of Debtor's objection to Lockton's claim. As such, the deposition
11 of Nelson is both "necessary and appropriate," especially where he
12 is a "fact witness." Johnston, 130 F.R.D. at 352; see also
13 American Casualty Co. v. Krieger, 160 F.R.D. 582, 588 (S.D. Cal.
14 1995). In cases where an attorney's conduct may be the basis of a
15 claim or defense (i.e., the basis of Lockton's claims of waiver),
16 "there is little doubt that the attorney may be examined as any
17 other witness." Johnston, 130 F.R.D. at 352.

18 As noted by the Krieger court, neither the federal rules of
19 procedure nor the federal rules of evidence prohibit taking the
20 deposition of any opposing party's attorney. "In fact, Rule 30(a)
21 of the Federal Rules of Civil Procedure permits a party to take
22 the testimony of 'any person' by deposition, without leave of
23 court. The Rule sets forth certain exceptions to this provision,
24 none of which exempt a party's attorney from being subject to
25 deposition." Krieger, 160 F.R.D. at 585. Nevertheless, "it is
26 appropriate to require the party seeking to depose an opposing
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1 party's attorney to establish a legitimate basis for requesting
2 the deposition, and to demonstrate that the deposition will not
3 otherwise prove overly disruptive or burdensome." Id. at 588. In
4 this case, Nelson is a fact witness to the transactions underlying
5 this contested matter, but is not litigation counsel in this
6 matter. Since Debtor has indicated that it may call Nelson as a
7 witness at trial, Lockton has shown a legitimate basis for
8 deposing Nelson, and has satisfied this court that the deposition
9 will not be disruptive or burdensome. In fact, in light of
10 Debtor's reservation of Nelson as a possible trial witness, it
11 would be unduly burdensome and disruptive to prohibit Nelson's
12 deposition.

13 At this time, the court will not place any limits on the
14 scope, timing or duration of Nelson's deposition. Any disputes
15 regarding these matters or questions of privilege may be resolved
16 by an emergency telephonic conference with the court. See ¶ 3 of
17 this court's scheduling order signed on October 28, 1999.
18 Therefore, in light of the foregoing, it is hereby

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20 ORDERED that Debtor's motion for protective order with
21 respect to the deposition of Nelson is DENIED.

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23 Dated: January 11, 2000

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Dennis Montali
United States Bankruptcy Judge