**Scene 3: Oral argument on Motion to Compel**

Moderator: All Rise.

**[Judge takes seat.]**

Judge: We’re here in the case of Monkey See Monkey Do, LLC v. Peach, Inc., for a hearing on both parties’ motions to compel. Is counsel ready?

Greybeard: Goliath Greybeard, your honor, and this is my colleague, John Goodall. We're appearing for Monkey See, and we’re ready.

Henry James: Henry Trotter James, for Peach, your honor, this is my co-counsel, Princess Peach, and we are ready to rumble.

Judge: Ok, then, let’s take up the Plaintiff’s motion first.

Greybeard: First, Peach has refused to provide source code for earlier versions of its facial recognition software. Prior versions of Peach's source code will tell us when Monkey See's Version 6 Breakthrough got added to Peach’s source code. And, if Dr. Zaius did a copy/paste job with my client’s trade secrets, we’ll see it in the earlier source code, even if they covered their tracks in later versions.

Judge: Are you overreaching by asking for ***all*** prior versions?

Greybeard: Not at all. Peach is a sophisticated tech company, a giant. They have strict version control, and all the code for all the prior versions is stored in one set of directories they can copy. And, as I’ve already told Mr. James and his client Peach, we will agree to reasonable source code protections.

Judge: Response, Mr. James?

Henry James: Your honor. This MONKEY sure is curious; they want every version of the source code for Peach’s facial recognition software. That’s just unreasonable. We’ve already offered to disclose the version used in the Peach Z being sold now. Many of those versions existed only in development and have never been used in a commercial product.

Judge: Monkey See argues that these early versions could support their claim that Dr. Zaius copied their source code and brought it over to Peach. Of course, there’s a lot of code here. Why don’t you comment on the burden to Peach?

Henry James: Of course, your honor. Complying with Monkey’s request puts Peach’s own source code and trade secrets at risk, along with the code and trade secrets of third parties. Further, the protective order in this case does not include additional protections for source code production.

Judge: I heard the Monkey team say they’d agree to reasonable protections. I’m sure you can work something out.

Henry James: Even so, Peach will need to load a copy of its entire source code repository for the facial recognition software onto specially prepared computers. The computers need all sorts of safeguards to ensure the code isn’t copied. There needs to be physical security, too, especially during the review. This is expensive and time consuming. If this weren’t burdensome, MONKEY would not have refused the exact same request from Peach.

Judge: We’ll get to that when we argue your motion. Mr. Greybeard, anything else?

Greybeard: Yes, your honor, moving to our second issue, Monkey See requested pricing information for the Peach Z in every market where it's sold and for Peach’s other smartphone models being sold in the same markets. The Peach Z is at the top of the market in terms of price, and it's the only model that uses Monkey See's technology. Peach has even promoted this technology as a distinguishing feature in the Peach Z that justifies its higher price.

Judge: Why do you need documents from every market in the world?

Greybeard: Trade secret misappropriation is not territorially limited like patent infringement. That means Monkey See is entitled to evidence of the amount of Peach’s profits from Monkey See's trade secrets, no matter where they come from.

Judge: Response from Mr. James?

Henry James: Your honor. Once again, MONKEY is just swinging from tree to tree. They’ve accused one small feature of one version of a complex product but they want pricing information for every model, including models that don’t even have the facial recognition feature. The breadth of this discovery is staggering. It would include over 400,000 documents. Even when Peach dedupes those documents, there are still over 5,000 responsive documents.

Judge: Thank you, I have your arguments.

**[Moderator takes an audience vote]**

**[Judge’s comments]**

Judge: Turning to the Peach’s motion, I see that you have two issues as well. Your first request is a bit unusual, Mr. James. You want a forensic inspection of several of plaintiff’s computer systems?

James: Your honor, my partner Princess Peach will be addressing our motion.

Princess: Yes, your honor. Let me explain our request. If Simon copied the source code to a flash drive, as MONKEY alleged, it would be reflected in his computer’s transfer log.

Judge: But Monkey See doesn’t know which computer belonged to Dr. Zaius.

Princess: True, but they know it is one of 20 computers still in use. We only need a technician to examine those 20 computers and retrieve transfer logs. This inspection can be limited to examining the transfer logs for certain types of files being transferred through the USB ports to reduce the burden on Monkey.

Judge: I suppose that sounds reasonable. Counsel for Monkey, does this address your concerns?

Greybeard: Your honor, my associate Mr. Goodall will be arguing these issues.

Goodall: Your Honor, MONKEY is a company of approximately 25 employees. The requested inspection would take a majority of the personal workstations in the company out of commission. Without their computers, the Code Monkeys will spend all day monkeying around.

Besides, we have already produced the company’s server logs, which show that Simon downloaded the software to his computer, and we have supporting witnesses, as well. Peach doesn’t need the transfer logs.

Princess: Your honor, if Simon copied files to a flash drive, it would have been recorded in his computer’s transfer log. No other documents can conclusively disprove MONKEY’s copying allegation. Accordingly, we contend we have the required showing of good cause to obtain this discovery.

Goodall: Are you the Princess of a mushroom kingdom?!? This analysis can’t prove *anything* conclusively. Dr. Zaius’s old computer was repurposed, and the transfer log may have been overwritten when it was assigned to a new employee.

Judge: Counsel, you will act with respect and civility! I’ll have no more out-of-turn interruptions or insulting remarks. Your arguments are noted. Now, is there anything else on Peach’s motion?

Princess: Yes, your honor, one last issue. We have also requested documents relating to MONKEY’s development and testing of facial recognition software, including prior versions of its source code. Monkey has asserted that the so-called “Version 6 Breakthrough” was added in version 6 of the Software, and thus the fact that Peach uses related technology proves that Peach misappropriated Monkey's version 6 of the software.

Judge: Whether they had this feature in earlier versions or not, their claim is you copied the source code in version 6. Is there any other reason why these documents would be relevant?

Princess: Your honor, MONKEY has made this an issue and we are entitled to adequate discovery to rebut Monkey's position.

Judge: Still, this is a very broad request, and MONKEY says it’s overly burdensome. Doesn’t Rule 26 now require me to determine if discovery is proportional to the needs of the case?

Princess: Yes, your honor. The recently amended version of the Rule requires that you consider all of the factors you see on the screen. These factors weigh in favor of allowing this discovery. Also, given the amount that MONKEY claims in damages, this discovery would not be disproportionate under Rule 26(b)(1).  Monkey has already said it would agree to reasonable source code protections. If we are going to produce source code, they should too.

Judge: Let me hear from MONKEY’s counsel.

Goodall: The production of the entire source code is not necessary or relevant given the allegations in this case. Versions 1-5 did not contain the Breakthrough feature that MONKEY believes was misappropriated by Simon, so those versions are irrelevant. Add to that the fact that source code sensitive, the crown jewels. Even with protections, there are risks. Those risks should only be taken when there is something relevant to the case. Thus, the reasonable scope of discovery under Rule 26(b)(1) would be to limit discovery of source code to the version that MONKEY alleges was misappropriated.

**[Moderator takes an audience vote]**

**[Judge’s comments]**