No. 10-2823

In the United States Court of Appeals for the Seventh Circuit

IN RE ERICH SPECHT, AN INDIVIDUAL AND DOING BUSINESS AS ANDROID DATA CORPORATION, AND THE ANDROID'S DUNGEON INCORPORATED. — PETITIONERS

ERICH SPECHT, ET AL.,

V.

GOOGLE, INC.

CASE NO. 09-CV-2572

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS THE HONORABLE **HARRY D. LEINENWEBER**, JUDGE PRESIDING.

GOOGLE, INC.'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2823

Short Caption: In re: Erich Specht, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Google Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Greenberg Traurig LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: Herbert H. Finn Date: 8/19/10

Attorney's Printed Name: Herbert H. Finn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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Attorney's Signature: /s/ Richard D. Harris Date: 8/19/2010

Attorney's Printed Name: Richard D. Harris

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None

Attorney's Signature: _____ Date: 8/19/10

Attorney's Printed Name: Jeffrey P. Dunning

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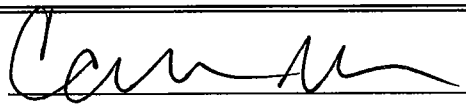
Attorney's Signature:  Date: 8/19/10

Attorney's Printed Name: Cameron M. Nelson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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I. STATEMENT OF JURISDICTION

The jurisdictional summary contained in Plaintiffs' Petition for Writ of Mandamus (the "Petition") is complete and correct.

II. FACTUAL BACKGROUND

A. Specht's Registration and Abandonment of the ANDROID DATA Mark

In approximately 1999, Plaintiff Erich Specht started a small business out of his home, operating under the name "Android Data Corporation" (First Amended Complaint, A032 – A033, ¶¶10-18). Android Data Corporation offered website hosting services for a few years, until its collapse at the end of 2002 (Counterclaim, A075, ¶¶18-19). Just before that collapse, Specht obtained a federal trademark registration for the mark ANDROID DATA, for use solely in association with "computer e-commerce software to allow users to perform electronic business transactions via a global computer network" (A074 – A075, ¶¶16-17).

Specht has not made any *bona fide* use of the ANDROID DATA trademark in commerce since the termination of Android Data Corporation's business in 2002 (Counterclaim, A075 – A076, ¶¶20-25). In 2003, he attempted (unsuccessfully) to sell Android Data Corporation's assets, and then accepted a full-time job with a publishing company (Id., ¶20). While he still performed "odd jobs" for friends and family, he made no use of the purported "ANDROID DATA" mark (Id., ¶¶20-25).

Specht's trademark registration for ANDROID DATA would have lapsed on April 22, 2009, had it not been for a phone call he received from an individual named Kenneth Robblee (Counterclaim, A076 – A077, ¶¶26-31). Robblee expressed interest in purchasing Specht's trademark registration, and disclosed to Specht that a "well-heeled" company may have interest in the abandoned mark (Id.). Specht told Robblee that he was not interested in Robblee's scheme, but then did exactly what Robblee proposed, including:

- Registering a new domain name, <android-data.com> (he had intentionally abandoned the original <androiddata.com> domain name years ago);
- Filing a Section 8 affidavit with the USPTO, including, as evidence of use, a copy of the website he had put online just the night before; and
- Filing back-dated corporate reports with the Illinois Secretary of State in order to resurrect Plaintiff Android Data Corporation, which had been dissolved years ago.

(Counterclaim, A077 – A080, ¶¶32-44).

Specht – who ultimately figured out that the "well-heeled" company was Google – then filed suit the very next week against Defendant Google, Inc. ("Google") and forty-seven (47) other defendants, alleging infringement of the ANDROID DATA mark he had not used since 2002 (Counterclaim, A081, ¶¶45-46; Complaint, A001 – A019).

B. Google's ANDROID Mark

Google uses the mark ANDROID in connection with its open-source operating system for mobile devices (Counterclaim, A073 – A074, ¶¶8-14). Google announced the Android Operating System in November 2007 (Id.). The first phone containing the Android Operating System was sold in late 2008. Google conducted a thorough trademark search before selecting the name "Android" (Id.). When it discovered Specht's trademark registration, it hired an investigator to determine whether Specht was making any use of his registered trademark (Id.). That investigation revealed that Specht was making no use of and had long ago abandoned the ANDROID DATA trademark (Id.).

C. Plaintiffs' Litigation Tactics

Plaintiffs and their counsel initially filed suit against not only Google, but also forty-seven other companies, including wireless service providers and telephone handset manufacturers, among others (Complaint, A001 – A019). Plaintiffs demanded $2 million in statutory damages for purported "counterfeiting" from each of these defendants pursuant to 15

U.S.C. § 1117(c)(2), for a total of nearly $100 million (Complaint, at A0018). They sought this sizeable sum despite the fact that this case is not a counterfeiting case.[1] Plaintiffs' counsel told a reporter that the reason they added so many defendants was to leverage a settlement, regardless of the merits of the case: "No judge will want to be flooded with that much paperwork. We'll probably be asked to sit down and work this out" (A145– A146).

After filing their $100 million suit alleging infringement of a trademark Plaintiffs have not used since 2002, Plaintiffs have employed a variety of vexatious litigation tactics in pursuit of their claims, including: (1) moving for a temporary restraining order and preliminary injunction, only to withdraw the motion later without a hearing (A020 – A026; A027); (2) attempting to name individual Google employees as defendants without any factual basis (A028, A034, ¶21; A061 – A062); (3) attempting to force Google to search the electronic files of several high ranking Google executives (including the company founders, Larry Page and Sergey Brin) who have had no involvement with the issues in this litigation (A096 – A110, A112, A165 – A169); and (4) obstructing depositions, resulting in sanctions against Plaintiffs' counsel (A119; A120 – A137).

D. Plaintiffs' Attempt to Add AT&T Mobility and Others for Purposes of Delay

The Motion to Disqualify that is the subject of the present Petition arises out of Plaintiffs' efforts late in the case to file a Third Amended Complaint adding AT&T Mobility and other wireless defendants to the litigation. The District Court set July 30, 2010 as the date to close fact discovery, at which time summary judgment motions could first be filed. (A160 – A163) As that date approached, Plaintiffs began seeking to move the deadline. On June 8, 2010, Plaintiffs attempted to extend the discovery period, but could not provide a basis for their requested

[1] Counterfeiting is statutorily defined as the use of a "false" or "spurious" mark. 15 U.S.C. § 1127. Here the marks are by admission not even identical – "ANDROID" vs. "ANDROID DATA."

extension. (A114 – A117, A118, A159) After that effort failed, Plaintiffs filed their Third Amended Complaint (without leave), purporting to add AT&T Mobility and three other defendants, and attempted to use that as an reason to cancel depositions. (Petition Ex. B, Dkt. No. 216; Petition Ex. D, Dkt. No. 217; A138 – A143, A147.) After that second attempt to postpone the close of discovery failed, Plaintiffs raised the issue of disqualification for the first time, and filed their Motion for Disqualification.

Plaintiffs could have sought to add defendants to this case months before the filing of their Third Amended Complaint. Early in the case, the District Court dismissed all of the named defendants except Google (A051, A052 – A071), but gave Plaintiffs the opportunity to amend their complaint to state claims against those additional defendants (*Id.*). Plaintiffs chose ***not*** to add the additional defendants back into the case. Those original defendants included Sprint and T-Mobile, whom Plaintiffs ***now belatedly attempt to add back to the case*** in their Third Amended Complaint, despite having passed up that opportunity a year earlier. (Petition Ex. B, Dkt. No. 216) With respect to Verizon and AT&T Mobility, Plaintiffs allege that the purported infringing acts began in November 2009 (Id., ¶¶ 71-75) and in March 2010, respectively (Id., ¶¶ 76-77), yet they postponed attempting to add those defendants until July 2010, just two weeks prior to the close of fact discovery.

Plaintiffs had also been aware of a potential conflict with respect to AT&T for quite some time, as the District Court apprised the parties of that potential conflict on several occasions beginning early in this litigation. (Petition Ex. E, pp. 22-25, 36) Plaintiffs never before raised that issue, not even in March 2010 when they learned of AT&T Mobility's alleged infringing acts.

Finally, Plaintiffs have known since the outset of their litigation that Google has indemnified and will continue to indemnify third parties with respect to Plaintiffs' claims (A174

– A257). Google has produced to Plaintiffs copies of those indemnity agreements (Id.) and has in fact defended this lawsuit on behalf of many of the previously-dismissed defendants. Indeed, Google previously defended Sprint and T-Mobile before they were dismissed from the case in 2009.

III. SUMMARY OF ARGUMENT

Plaintiffs' Motion to Disqualify Judge Leinenweber is not borne of any genuine concern for judicial ethics or the integrity of the judicial system, but rather of gamesmanship and a desire to stall the disposition of this case on the merits. On the eve of the close of fact discovery, Plaintiffs attempted to derail the imminent filing of dispositive summary judgment motions by seeking to add four new defendants, one of whom (AT&T Mobility) was included for the purpose of triggering questions of disqualification.

Despite the fact that Google has consistently indemnified every other defendant brought into this case, Plaintiffs argue that any ruling in this case will affect the telecommunications industry as a whole, and AT&T in particular. Because Judge Leinenweber's spouse is a member of AT&T's board of directors, and because both he and his spouse own AT&T stock, Plaintiffs argue that he must be disqualified. It is well established, however, that such expansive, industry-based arguments are not proper grounds for disqualification. Plaintiffs' belated attempt to add a sham defendant in order to fabricate a conflict to compel Judge Leinenweber's recusal, seemingly in response to unfavorable rulings sanctioning Plaintiffs' counsel for discovery violations, is the worst kind of tactical gamesmanship, and has no place in law or public policy.

The District Court properly concluded that Plaintiffs' Motion for Leave to File Third Amended Complaint was offered merely for purposes of undue delay, dilatory motive, and undue prejudice. The District Court also correctly held that there was no conflict of interest in deciding Plaintiffs' Motion for Leave to File Third Amended Complaint, and in proceeding with

the case as a whole. Nor could a reasonable person question the Court's impartiality under these circumstances, especially in light of Plaintiffs' vexatious conduct. As a result, 28 U.S.C. § 455(a) does not require disqualification. The District Court's alleged "interest" in the case is nonexistent, and thus the mandatory recusal provisions of 28 U.S.C. § 455(b) also do not apply. The Court should deny the Petition and affirm the District Court's decision not to recuse itself.

IV. ARGUMENT

Plaintiffs' Motion to Disqualify is nothing more than a means to having a new judge assigned to the case who will hopefully not be as familiar with Plaintiffs' vexatious and dilatory litigation tactics and the lack of merit of their claims. To the extent there was ever any legitimate disqualification issue (there is not), Plaintiffs have been aware of it since at least March 2010, yet made no effort to raise it until the eve of the discovery cut-off and the filing of dispositive summary judgment motions. Plaintiffs waited to seek disqualification until ***after*** their counsel was sanctioned, their attempts to extend discovery failed, and their plan to unilaterally cancel scheduled depositions was rejected by the district court.

Regardless, no legitimate disqualification issue ever existed here. Plaintiffs' argument that this lawsuit will somehow "substantially affect" Judge Leinenweber's interests, despite Google's offer to indemnify AT&T Mobility, and despite the utter lack of merit of the underlying suit, is simply too ethereal to constitute a proper grounds for disqualification. If Plaintiffs were to prevail in their efforts to disqualify Judge Leinenweber under these circumstances, that success would be an open invitation to disgruntled litigants to fabricate specious "conflicts" for the sole purpose of disqualifying judges with whom they are dissatisfied.

A. The Legal Standard Governing Recusal Is Stringent

"Judges have an obligation to litigants and their colleagues not to remove themselves needlessly." *In re Nat'l Union Fire Ins. Co. of Pittsburgh*, 839 F.2d 1226, 1229 (7th Cir. 1988).

Recusal "benefits . . . the litigant who sought this outcome, but it may injure the judge who must take over the case and the litigant aggrieved by the substitution." *New York City Housing Development Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir. 1986). A district judge is "obligated ***not*** to recuse himself without reason just as he is obligated to recuse himself when there is reason." *Id.* (emphasis added). *See also United States v. Baskes*, 687 F.2d 165, 170 (7th Cir. 1981). The statute governing recusal, 28 U.S.C. § 455, "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice," nor is it "intended to 'bestow veto power over judges or to be used as a judge shopping device.'" *Eppley v. Iacovelli*, 2009 WL 1033391, *3 (S.D. Ind. Apr. 16, 2009) (citing *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995)).

Plaintiffs seek to disqualify Judge Leinenweber under § 455(a) and/or § 455(b). The relevant provisions of § 455 state, in relevant part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * * *
>
> (4) He knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding . . .
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * * *
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party . . . [or]
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455.

Under § 455(a), a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This is an objective standard that asks if a reasonable observer would perceive "a significant risk that the judge will resolve the case on a basis other than the merits." *Hook v. McDade,* 89 F.3d 350, 354 (7th Cir. 1996). In evaluating whether a judge's impartiality might reasonably be questioned, the relevant inquiry is "from the perspective of a ***reasonable*** observer who is ***informed of all the surrounding facts and circumstances***." *In re Sherwin-Williams Co.*, 607 F.3d 474, 477 (7th Cir. 2010) (citation omitted, emphasis in original). In addition to being well-informed about the surrounding facts and circumstances, a reasonable person is a "thoughtful observer rather than . . . a hyper-sensitive or unduly suspicious person." *Id.* at 478; *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001). *See also Te-Ta-Ma Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 246 F.Supp.2d 980, 987 (N.D. Ill. 2003) (noting that an inquiry under § 455(a) is made based on a reasonable person standard, as opposed to a "hypersensitive or unduly suspicious person," so as to avoid "a system of peremptory strikes and judge shopping") (citing *Hook*, 89 F.3d at 354).

As for § 455(b), its provisions are interpreted strictly. The legislative history notes that the purpose of § 455(b) was to "set[ ] specific standards [and] eliminate the uncertainty and ambiguity arising from the language in the existing statute." H.R. REP. 93-1453 (1974), 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. "Precisely because § 455(b) sets forth mandatory disqualification rules, courts have read its requirements strictly, so that both judges and litigants will know when a judge must step aside." *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998). If the Court's purported interest in the outcome "is not direct, but is remote,

contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's impartiality." *Hook,* 89 F.3d at 356 (citations omitted).

B. Section 455(a) Does Not Require Disqualification Because the Court's Impartiality Would Not Be Questioned by a Reasonable Observer

Disqualification is not required under § 455(a), because under the circumstances of this case, no reasonable observer could question Judge Leinenweber's impartiality. There is simply no basis on which to conclude that a reasonable, well-informed observer, fully apprised of the relevant facts, would perceive ***any*** risk, much less a significant risk, that Judge Leinenweber would resolve this case on any basis other than its merits. A reasonable observer would note that Plaintiffs could have attempted to add AT&T Mobility as a new defendant in this case at least as early as March 2010, when AT&T Mobility publicly announced that it would begin selling phones using Google's Android OS software.[2] A reasonable observer would also note that Plaintiffs have long been aware that adding AT&T Mobility as a defendant could create a potential recusal issue. And a reasonable observer would certainly note that Plaintiffs made no attempt to add AT&T Mobility as a defendant until the eve of dispositive motions--***after*** Judge Leinenweber sanctioned Plaintiffs' counsel for discovery violations.[3] Consequently, it is clear

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[2] Though not required to dispose of the Petition, this Court is certainly capable of taking judicial notice of the ubiquity with which wireless companies such as AT&T Mobility promote their products though various forms of media. Moreover, it is reasonable to presume that, given the nature of their claims against Google, Plaintiffs have been paying close attention to the use of the ANDROID trademark in the marketplace. Thus, Plaintiffs' claim that they were not aware of AT&T Mobility's publicly announced use of the ANDROID mark until they deposed a Google representative on July 9, 2010 is sorely lacking in credibility.

[3] In that regard, the situation here is similar to that in *KPERS*, where the Eighth Circuit noted:

> Judge Bartlett disclosed his ownership of stock in Boatmen's parent company on October 26, 1994. From that time until almost a year later, conferences were held in which the parties and the court discussed various aspects of this case. Not once during this period of time did KPERS question the court's appearance of impartiality due to the separate case involving Boatmen's. Considering these

from the standpoint of a reasonable observer that Plaintiffs are using the pretext of disqualification to stall resolution of Google's forthcoming summary judgment motion, to delay the case, and to attempt to obtain a different judge who would be less familiar with Plaintiffs' baseless allegations and vexatious litigation tactics.

A reasonable observer would also understand that, contrary to Plaintiffs' unsupported conjecture, Google's willingness to defend and indemnify AT&T Mobility effectively removes any potential adverse effect to AT&T Mobility arising out of a potential judgment against Google.[4] Finally, a reasonable observer would also understand that there is no likelihood of a ruling in this case somehow resulting in an injunction adverse to AT&T, especially given Plaintiffs' position that this is a "reverse confusion" case (A046, ¶78).

Because a reasonable person would not question Judge Leinenweber's impartiality, Plaintiffs' "tactical move" to disqualify "an experienced district judge who is attempting to efficiently resolve the case," based on their fear of "a looming adverse decision," does not and cannot support disqualification under § 455(a). *KPERS*, 85 F.3d at 1365.

> facts, an informed person would not now reasonably question Judge Bartlett's ability to preside fairly over this case because of his interest in a non-party company. An informed person might instead reasonably question the sincerity of KPERS' belated concern.

85 F.3d at 1362-63.

[4] While Plaintiffs speculate that "AT&T worked with Google to find a way for the Judge to continue in the Proceedings despite his conflict of interest" (Petition, p. 24), once again they offer no actual evidence to support this false claim. Google's willingness to indemnify AT&T Mobility is based on the same indemnification agreements offered to many other defendants originally named in this lawsuit (A174 – A257). Plaintiffs' suggestion that Google's offer to indemnify AT&T Mobility is part of some nefarious conspiracy to thwart Plaintiffs' efforts to disqualify Judge Leinenweber is nothing more than fantasy, unsupported by any facts.

C. Disqualification is Not Required Under § 455(b), Because Any Purported "Interest" That Judge Leinenweber Has in the Outcome of This Proceeding Is Remote and Highly Speculative

Turning to § 455(b), Plaintiffs have all but conceded that neither Judge Leinenweber nor his wife have a "financial interest" in this case that would require disqualification under that portion of § 455(b)(4). Rather, Plaintiffs rely on the general language in § 455(b)(4) and § 455(b)(5)(iii), which state that disqualification is required where a judge or his spouse have an "interest that could be substantially affected by the outcome of the proceeding."[5] The alleged interest here is simply too remote, speculative, and contingent to invoke the mandatory recusal provisions of § 455(b).

1. Plaintiffs have failed to demonstrate that Judge Leinenweber has any interest that would be "substantially affected" by the outcome of this proceeding

Plaintiffs offer nothing more than unsupported speculation that Judge Leinenweber and/or his wife's interests in AT&T would be "substantially affected" by the outcome of this proceeding in which AT&T is not a party. Google, however, has offered to indemnify AT&T Mobility against Plaintiffs' claims, just as it has every other defendant that Plaintiffs have sued (Petition Ex. G, pp. 3-4, A174 – A257). Consequently, even in the unlikely event that Google were to lose this case, and even if Plaintiffs were then to sue AT&T Mobility for the same alleged infringement, AT&T Mobility would not suffer any direct financial loss. Any damages arising from the alleged trademark infringement would be paid by Google. Indeed, even without the promise to indemnify, Plaintiffs would likely never be able to recover monetary damages from AT&T Mobility, because Google would be able to satisfy the judgment and any further

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[5] Plaintiffs have not cited, and Google has not found, any authority which addresses whether the wording "interest that could be substantially affected by the outcome of the proceeding" has a different meaning in the context of § 455(b)(4) versus § 455(b)(5)(iii). Thus, for purposes of this argument Google treats § 455(b)(4) and § 455(b)(5)(iii) as setting forth the same standard, and refers to them interchangeably below.

recovery from AT&T Mobility would be a double recovery. In other words, there simply is no credible risk of any direct financial loss to AT&T Mobility as a result of an adverse ruling against Google in this case.

Plaintiffs' hypothetical suggestion that AT&T Mobility's "reputation and goodwill" may be somehow at stake in a suit to which AT&T is not even a named party is beyond speculative. (Petition, pp. 21-22.) Plaintiffs have not identified any actual "reputation and goodwill" at stake, nor have they established that Judge Leinenweber has any interest in protecting the "reputation and goodwill" of one of AT&T's many subsidiaries. *See Williams v. Balcor Pension Investors*, 1990 WL 205805, *6 (N.D. Ill. Nov. 28, 1990) (rejecting argument that recusal was required where one defendant was the broker for a pension fund in which the judge's husband and son had invested, based on plaintiff's argument that "the Court might appear predisposed to reject any claims from plaintiffs which threaten [the broker's] reputation"). Plaintiffs' reliance on *SCA Servs., Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977), in support of that argument is misplaced. The *Morgan* court based its holding on the fact that the judge's brother had a significant ***financial*** interest in the case before the judge, based on the fact that he was a senior partner in a law firm which represented one of the parties to that case. 557 F.2d at 115. While the *Morgan* court noted in *dicta* that the judge's brother may have "non-pecuniary" interests in "his firm's reputation and goodwill" which could also be affected by the judge's rulings, its decision was clearly based on the brother's financial interest in the law firm of which he was a partner. *Morgan* does not support recusal based on an unspecified, speculative injury to a non-party subsidiary of a non-party parent company, unaccompanied by any risk of actual, pecuniary harm.

Plaintiffs further speculate by arguing about a hypothetical injunction which might be issued in the event that Plaintiffs actually sued AT&T Mobility and then actually prevailed on

their claims. (Petition, p. 22.) Given that this is now a "reverse confusion case" by Plaintiffs' own admission (A046, ¶78), and given that Plaintiffs unilaterally withdrew their preliminary injunction motion earlier in this case, it is unclear how Plaintiffs would ever obtain such injunctive relief against Google, let alone AT&T Mobility, since they have conceded the lack of any irreparable harm. Moreover, Plaintiffs simply speculate about what the terms of such an injunction might be, how AT&T Mobility might be affected thereby, and whether the effects of such an injunction would be addressed within the indemnification agreement between Google and AT&T Mobility. Once again, unsupported speculation and conjecture does not justify disqualification of a district judge.

Finally, Plaintiffs' argument concerning 28 U.S.C. § 455(f) is merely a strawman that does not apply in this case. On its face, § 455(f) only applies to a situation in which a judge or his/her family member "has a financial interest ***in a party***" to the case before him/her (emphasis added). Here, there is no dispute that neither Judge Leinenweber nor his wife has any financial interest in any party to this case. If a judge has no financial interest in ***a party*** to begin with, then obviously divestment is not required. And in any event, Plaintiffs' argument that divestment is the ***only*** way to "cure" a conflict of interest is incorrect, since on its face § 455(f) merely describes ***one*** way in which a conflict of interest may be addressed.[6]

Plaintiffs simply have not established that Judge Leinenweber or his wife have an interest that would be "substantially affected" by the outcome of this case. Indeed, Plaintiffs have yet to "explain how the outcome of this lawsuit could affect" any interest on the part of Judge Leinenweber or his wife at all, "let alone 'substantially affect' that interest." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1316-17 (2nd Cir. 1988).

[6] Notably, Plaintiffs made no arguments relating to § 455(f) in the District Court, raising them for the first time on appeal.

2. Plaintiffs have failed to demonstrate that any ruling in *Specht v. Google* would necessarily constitute collateral estoppel in *Specht v. AT&T Mobility*

Plaintiffs' argument that collateral estoppel would apply in any separate case they may bring against AT&T Mobility ignores the fact that Plaintiffs' claims against AT&T Mobility are ***not*** the same as their claims against Google, because AT&T Mobility's use of the mark ANDROID in connection with the sale of mobile phones and wireless services is different than Google's use of the mark ANDROID for its operating system software. Collateral estoppel only applies where the issue decided in the earlier case is ***identical*** to the issue presented in later case. *See Santa's Best Craft, LLC v. St. Paul Fire and Marine Ins. Co.*, -- F.3d ----, 2010 WL 2605874, *12 (7th Cir. July 1, 2010).

While Plaintiffs may assert the same causes of action against AT&T Mobility that they asserted against Google, Plaintiffs' claims against the two companies can hardly be said to be "identical in virtually every respect." Google uses the ANDROID trademark in association with the distribution of its open-source Android OS software program—which it distributes for free through its website at www.android.com—and does not provide mobile phone service.

In contrast, to the extent that AT&T Mobility has used the ANDROID trademark in commerce, as alleged by Plaintiffs, such use relates to the distribution and/or promotion of mobile phones and wireless services—different goods and services than those distributed by Google. Moreover, according to Plaintiffs' own allegations, AT&T Mobility's alleged use of the ANDROID trademark did not begin until early 2010, some two and a half years after Google's announcement of the Android Operating System.[7] Thus, AT&T may be able to raise different defenses in its case (if ever filed) than Google raises in this case. The issues in this case, when compared to a hypothetical future case against AT&T, are not entirely identical, and it is not a

[7] This distinction is potentially relevant because Specht claims that he resumed using the ANDROID DATA mark in commerce in 2009.

foregone conclusion that AT&T will be collaterally stopped from presenting defenses because of an earlier case to which it was not a party. *See Whitley v. Seibel*, 676 F.2d 245, 248 n.1 (7th Cir. 1982) (collateral estoppel can never be used as a sword against a party who has not previously had his day in court).

3. Plaintiffs invite this Court to fashion a new rule requiring disqualification based on a judge's remote or speculative interest in a non-party to a case

Even if the decision below could have some theoretical collateral estoppel effect on non-party AT&T Mobility in an unfiled future lawsuit, at least one other circuit has rejected Plaintiffs' argument that disqualification is required based on such a speculative or contingent possibility of collateral estoppel in another proceeding. *See In re Kansas Public Employees Retirement System (KPERS)*, 85 F.3d 1353 (8th Cir. 1996). In that case, KPERS argued that disqualification was required where the judge owned stock in a non-party company, Boatmen's, because the judge's rulings "may have a collateral effect upon issues in Boatmen's separate declaratory judgment action" against that party. *Id.* at 1361. While KPERS made a "general assertion that there are overlapping issues between the two cases," it did not show that the issues in those two cases were identical. *Id.* The court further noted that KPERS' argument "essentially invites us to speculate on whether a district judge would decide issues in a case before him a particular way in hopes of persuading a different judge presiding over a separate case to reach the same decision." *Id.* at 1362.

In refusing to find that the judge's interest in a non-party required disqualification, the *KPERS* court noted that the judge's "financial interest in this case in these circumstances is simply too remote, speculative, and contingent to be 'an interest that could be substantially affected by the outcome of the proceeding' before him." *Id.* The *KPERS* court further stated:

> [W]e are reluctant to fashion a rule requiring judges to recuse themselves from all cases that might remotely affect nonparty companies in which they own stock. We believe such a rule would paint with too broad a stroke."

Id. The Eighth Circuit explicitly rejected an attempt to analogize and apply the reasoning of *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990), to the dissimilar facts before that Court (as Plaintiffs have attempted to do here):

> KPERS draws upon dicta in *Aetna*, stating that because a decision in any one of the cases might be used collaterally in all the rest, an additional reason for questioning the trial judge's impartiality existed. We do not find the *Aetna* dicta to be persuasive authority here, and our research has revealed no other authority for the proposition that a judge's interest in a nonparty company can create a conflict of interest mandating recusal under § 455(b)(5)(iii).

Id.

While the Seventh Circuit does not appear to have addressed this precise issue, it has consistently found in the same vein that a judge's tenuous and speculative "financial interests" in non-parties cannot constitute a sufficient basis for disqualification under § 455(b):

> The value of many assets, even the performance of the economy as a whole (and hence all assets), may depend on rules of law. It could be said that no judge who owns a house should render a decision that potentially affects the value of real estate in general, that no judge who owns stock should decide a case under the securities or antitrust laws, and so on. Effects of this sort are both ubiquitous and too indirect to require disqualification. Cf. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714-15 (7th Cir. 1986). The effects are small, and almost every judge will have some remote interest of this sort. Moreover, the effects may have offsets that are difficult to predict. A decision under the securities laws that diminishes somewhat the value of bonds may increase somewhat the value of stocks; no judge with a diversified portfolio will be able to predict the effect on his wealth, and therefore there is little risk of either actual bias or the appearance of impropriety.

New York City Development Corp., 796 F.2d at 979-980. *See also O'Regan*, 246 F.3d at 988 (denying motion to disqualify judge under § 455(b)(4) based on the judge's wife's financial interest in a non-party company which was a client of a law firm involved in the case).

This kind of over-expansive reading of § 455(b)(4) is exactly what Plaintiffs are now proposing. Plaintiffs' position that § 455(b)(4) requires a judge to recuse himself simply because a judgment in the case before him might, under certain circumstances, affect the rights of a corporation in which he owns stock simply has no basis in the statutory language of § 455(b)(4), which does not require disqualification based on remote, contingent or speculative interests. *See In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986) (denying motion for disqualification under § 455(b)(4) on the basis that the judge held a large investment in a nonparty bank that may be affected by rulings in the case, where petitioners argued that any rulings adverse to one defendant would "have a dramatic impact on the entire banking industry and thus on [the judge's] investment as well").

4. The *Aetna* and *Gordon* holdings on which Plaintiffs rely are inconsistent with the Seventh Circuit's construction of § 455(b), and are limited to their specific facts

Plaintiffs base their argument for disqualification on the Sixth Circuit's opinion in *Aetna* and the ruling of the Southern District of California in *Gordon v. Reliant Energy, Inc.*, 141 F.Supp.2d 1041, 1043 (S.D. Cal. 2001). Both of those decisions are readily distinguishable from the case before this Court.

First, *Aetna* is ***not*** a "close parallel" to this case. (Petition, p. 16.) *Aetna* involved an extremely unusual situation where the judge had originally recused himself from seven cases that had been consolidated for trial, only to reclaim responsibility for several of those cases months later, where "the same circumstances that had persuaded [the judge] to recuse himself previously" still existed. 919 F.2d at 1143. The court's holding in *Aetna* was based on multiple, direct interests between the judge and existing parties or counsel to the consolidated proceedings involved in that case. *Id.* at 1144-45 (noting that the judge "owned a one-half interest in Brandon & Hull [and] Aetna provided Brandon & Hull a similar indemnity policy to those involved in the

cases at issue," and that the judge owned stock in a bank with an interest in the FDIC's claim in one of the those proceedings). While Plaintiffs focus solely on the court's analysis regarding the involvement of the judge's daughter as an attorney in several of the consolidated cases, the Sixth Circuit noted that its decision to disqualify the judge was based on all of those circumstances considered in combination. *Id.* at 1145. Notably, none of those circumstances are present here.

To the extent that the *Aetna* court's holding was based on the potential for collateral estoppel to apply among the various cases that had been consolidated in that proceeding, disqualification was required only because all of the consolidated cases constituted a single "proceeding" for purposes of § 455(b). *Id.* at 1146-47 (Kennedy, J., concurring for a majority of the court) (noting that "the consolidation of the cases, even if only for pre-trial purposes, necessarily involves the entanglement of certain aspects of the [several] matters with the cases in which [the judge's daughter] represented the FDIC"). *Cf. In re Hatcher*, 150 F.3d at 631 (noting that, in contrast to *Aetna*, separate criminal cases against separate defendants were separate "proceedings" under § 455(b), "[n]o matter how closely related the two cases were factually or legally (as different aspects of the same conspiracy)"). Thus, a proper reading of *Aetna* is that it is limited to its specific facts, which involved a single "proceeding" before the court, and does not extend to a judge's relationship with parties involved in separate proceedings.

Similarly, the facts in *Gordon* are readily distinguishable, because in *Gordon* the judge and his family were members of a putative class of purchasers of electricity from the defendants. 141 F.Supp.2d at 1043. The judge noted that, while the plaintiffs had amended their complaints to exclude the judge and his family from the putative class, those exclusionary provisions did not prevent the judge or his family from initiating or participating in another suit against the same defendants for the same causes of action. *Id.* Thus, the judge's interest in *Gordon* was not merely

an interest in a party who could potentially be affected by a ruling in the case, but rather was a direct financial interest in the case itself.

Furthermore, the portions of the *Aetna* and *Gordon* holdings on which Plaintiffs rely are fundamentally inconsistent with the Seventh Circuit's position that an interest which is "remote, contingent, or speculative is not the kind of interest which reasonably brings into question a judge's impartiality." *Hook,* 89 F.3d at 356 (7th Cir. 1996). Indeed, both the *Aetna* and *Gordon* courts admitted that their holdings were based on interests which are contingent and speculative. For instance, the *Aetna* court based its holding on the fact that "[a] decision on the merits of any important issue in any of the seven cases . . . ***could or might*** constitute the law of the case in all of them, or involve collateral estoppel, or ***might*** be highly persuasive as a precedent." 919 F.2d at 1143 (emphasis added). Similarly, the district court in *Gordon*, citing solely to the Eighth Circuit's decision in *Aetna*, based its holding on the fact that "***if*** members of the judge's family or staff were involved in related litigation not before the judge, decisions of the judge ***could*** nevertheless have a preclusive effect in any related actions," and that "any decision on the merits . . . ***could*** result in collateral estoppel in the related cases in which the undersigned judge, a member of his family, or a member of his staff has a personal interest." 141 F.Supp.2d at 1044 (emphasis added).

Clearly, the decisions in *Aetna* and *Gordon* were premised to a large extent on remote and speculative "what ifs" or theoretical situations that could arise at a later time, which, under Seventh Circuit law simply does not constitute a basis for disqualification under § 455(b).

D. Plaintiffs' Motion to Disqualify Judge Leinenweber Under 28 U.S.C. § 455 Should Further Be Denied as Dilatory and Untimely

Plaintiffs' Petition should likewise be denied on the basis that Plaintiffs' Motion to Disqualify was dilatory and untimely. At the outset, Google must correct Plaintiffs' mis-

statement that "the Seventh Circuit has explicitly rejected any timeliness requirement for motions under [28 U.S.C.] Section 455" (Petition, p. 19, citing *Morgan*, 557 F.2d at 117). While the *Morgan* court did state that Section 455 does not "contain any time limits within which disqualification must be sought," Plaintiffs ignore the fact that this aspect of the *Morgan* decision was inconsistent with a prior decision of this Circuit, and has been repeatedly questioned by this Circuit and other courts on numerous occasions since.

In a decision issued the year before the decision in *Morgan*, this Circuit stated that "[t]he law is well settled that one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976). After the decision in *Morgan*, Judge Posner noted, in finding a litigant's motion for disqualification under 28 U.S.C. § 455 to be untimely, that:

> The continuing validity of [the *Morgan*] decision was questioned in *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), where we pointed out that "our decision [in *Morgan*] stands alone," and likewise in *Union Carbide v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716-17 (7th Cir. 1986). [*Morgan*] is a weak precedent because it had not cited *Patrick*, which had established the law of this circuit on the question.

Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1057, 1060 (7th Cir. 1992). *See also Murphy*, 768 F.2d at 1539 (noting that "[t]he Fifth Circuit has called the discussion in *Morgan* dicta and rejected the conclusion on the merits, reasoning that Congress did not put a time limit in § 455 because time limits were already so firmly fixed in both statute and common law that there was no need to add another"); *Union Carbide*, 782 F.2d at 716 (noting that the *Morgan* position has been "uniformly rejected in the other circuits") (citing *Murphy*, 768 F.2d at 1539); *In re Edgar*, 93 F.3d 256, 257 (7th Cir. 1996) (noting that "[d]elay can be fatal" to a request to disqualify a judge under 28 U.S.C. § 455) (citing *Murphy*, 768 F.2d

at 1539). Thus, Plaintiffs' statement that this Circuit has "explicitly rejected" a timeliness requirement for motions under § 455 is misleading at best.

District courts in this Circuit have routinely followed the rule of *Patrick* that "one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *See, e.g., In re African-American Slave Descendants Litigation*, 307 F.Supp.2d 977, 983 (N.D. Ill. 2004) (finding defendant's argument that plaintiff's motion under § 455 was untimely to be meritorious); *In re Garofalo's Finer Foods, Inc.*, 186 B.R. 414, 440-41 (N.D. Ill. 1995) (finding motion for recusal under § 455 to be untimely, citing *Patrick*).

Even if Plaintiffs' request that Judge Leinenweber be disqualified under § 455 were meritorious (it is not), their failure to raise that issue until the eve of the close of discovery, and only after Judge Leinenweber had ruled against them and their counsel on numerous occasions, alone justifies denial of Plaintiffs' Petition. *See Union Carbide*, 782 F.2d at 716 (noting that a party's distress at rulings made by the trial judge "is not a good reason for delay" in moving for disqualification under § 455); *Schurz Communications*, 982 F.2d at 1060 (noting that "[l]itigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them"). It is not surprising that Plaintiffs are not happy with Judge Leinenweber's rulings to date, and are not overly optimistic regarding their chances of prevailing on Google's forthcoming motion for summary judgment on abandonment. However, § 455 is not a vehicle for "judge shopping" by a litigant displeased with rulings made in his case. And indeed, such judge shopping is overtly harmful to Google – not because any other judge in this District would reach a different conclusion upon the ultimate disposition of this case, but rather because only Judge Leinenweber has full knowledge and experience with

Plaintiffs' vexatious litigation tactics, which Google fully intends to address with the District Court upon resolution of its summary judgment motion. This Court should not entertain Plaintiffs' transparent attempt to discard the assigned judge for another judge that would not be familiar with their case and their tactics.

E. Plaintiffs Fail to Identify Any Authority To Support Their Argument That Judge Leinenweber Should Not Have Ruled on Plaintiffs' Motion to Amend

In addition to arguing for Judge Leinenweber's general disqualification, Plaintiffs also argue that Judge Leinenweber was not able to rule on Plaintiffs' Motion for Leave to Amend because the proposed Third Amended Complaint involves AT&T Mobility -- among three other similarly situated parties. But Plaintiffs have presented no authority for this argument. Indeed, Plaintiffs fail to cite even a single case where a Court held that a district judge was disqualified from ruling on a motion to amend merely because a plaintiff sought to add a party that may create a recusal situation -- regardless of the merits of the request for leave. Were that the law, any party could engage in "judge shopping" by asserting questionable claims against third parties solely for the purpose of creating a theoretical disqualification issue. Even if the request is meritless and untimely, the original judge would have to recuse himself or herself, and by the time the new judge determined that the request was meritless, the harm would already be done.

Judge Leinenweber's decision to deny Plaintiffs' Motion for Leave on the basis of undue delay, dilatory motive and undue prejudice to Google was entirely proper. As Judge Leinenweber noted in his Order, Plaintiffs "stated no compelling reason why [they] submitted [their] amended complaint adding four new defendants near the eve of the close of oral discovery and just before Google has leave to file a motion for summary judgment." Even now, Plaintiffs have not provided a satisfactory explanation for the late timing of their belated Motion for Leave.

Plaintiffs also argue that AT&T Mobility somehow "benefited" from the Judge's ruling, based on the fact that Plaintiffs will have to file a separate lawsuit to pursue their claims against AT&T Mobility. This argument is supported by neither authority nor logic. As noted above, Google has agreed to defend and indemnify AT&T Mobility against Plaintiffs' claims, just as it had agreed to indemnify each of the other original defendants named by Plaintiffs. Plaintiffs were provided with copies of Google's indemnification agreements with many of those defendants, which state that Google agrees to "cover and protect [defendant] against any and all loss, liability, damage, penalty, cost and reasonable expense it may sustain by reason of any such claim" asserted by Plaintiffs (A174 – A257). Google has offered the very same indemnification terms to AT&T Mobility. Thus, from AT&T Mobility's perspective, there is little to no difference between participating in this case or a new lawsuit -- as it would face no liability.

Plaintiffs' complaint that pursuing their claims in a separate lawsuit would make the prosecution of their claims against AT&T Mobility and the three other Carrier Defendants "more difficult, time-consuming and expensive" is disingenuous for several reasons. First, had Plaintiffs not unduly delayed in asserting claims against the Carrier Defendants, leave to amend may well have been granted and this issue would not even be before this Court. Second, this is not a case where Judge Leinenweber's ruling extinguished any substantive rights that Plaintiffs may have with respect to their claims against AT&T Mobility. To the contrary, Plaintiffs concede that they are free to bring their claims against AT&T Mobility in a separate lawsuit. Finally, regardless of whether Plaintiffs' claims against the Carrier Defendants proceeded as part of this lawsuit or a separate suit, Plaintiffs would still be required to engage in discovery relative to those claims—which would likely be "difficult, time-consuming and expensive" in either event.

Nor does the decision in *KPERS* support Plaintiffs' position that Judge Leinenweber should not have even ruled on the Motion for Leave. While Plaintiffs correctly note that the district judge in *KPERS* recused himself from ruling on a motion to intervene filed by a company in which he owned stock, Plaintiffs ignore the fact that that ruling was merely noted in passing as part of the procedural history of the case, and the correctness of that ruling was never considered by the Eighth Circuit. 85 F.3d at 1355. Thus, *KPERS* simply did not hold that § 455 requires recusal from hearing a motion for leave to amend involving a potential party in which a judge may have an interest, and Plaintiffs cite no other case to support that proposition. To the contrary, the courts have recognized that attempts to add defendants to create conflicts in order to disqualify the judge would "allow plaintiffs to manipulate the identity of the decisionmaker and to engage in 'judge-shopping.'" *Andersen v. Roszkowski*, 681 F.Supp. 1284, 1289 (N.D. Ill. 1988).

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Petition for a Writ of Mandamus should be denied.

Respectfully submitted,

Dated: August 20, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided a true and correct copy of the foregoing Google Inc.'s Response to Plaintiffs' Petition for Writ of Mandamus to all persons listed below on August 20, 2010, by hand delivery to:

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