

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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| KEITH DUNBAR, |) | Case No.: C 12-3305 LHK |
| |) | |
| Plaintiff, |) | ORDER DENYING PLAINTIFF'S |
| v. |) | MOTION TO ENFORCE THE |
| |) | COURT'S JANUARY 8, 2013 ORDER |
| GOOGLE, INC., |) | |
| |) | (Re: Docket No. 254) |
| Defendant. |) | |

Plaintiff Keith Dunbar (“Dunbar”) moves to enforce the court’s January 8, 2013 order compelling Defendant Google, Inc. (“Google”) to produce certain documents. Although not explicit in his papers, at the hearing Dunbar also requested sanctions. Having reviewed the parties’ papers and considered their oral arguments, the court DENIES Dunbar’s motion.

DISCUSSION

The parties were last before the court regarding this discovery dispute on January 8, 2013.¹ At that time, Dunbar sought to compel supplemental production of various documents responsive to several of his requests, including the documents at issue here.² In that earlier motion and again here, Dunbar claims that Google has not produced three types of documents: (1) documents

¹ See Docket No. 242.
² See Docket No. 215.

1 relating to “Gmail ad targeting and data flow” referenced in one of the documents Google did
2 produce; (2) documents found at a link referenced in another produced document; and (3) “any
3 prior, final, or subsequent versions” of four of the documents.³ Following the January 8 hearing,
4 the court issued an order in part requiring Google to produce those documents.⁴

5 Google describes the documents at issue as two versions of explanations of its automated
6 processing system in Gmail.⁵ The first version is a diagram that provides an overview of the
7 system (“Diagram”) and includes a link to document with a more detailed explanation
8 (“Description”).⁶ The second version is the document just described, the Description, which
9 contains a link back to the Diagram.⁷ According to Google, “Gmail ad targeting and data flow” is
10 the hyperlink in the Diagram and the link referenced in Dunbar’s second request is the hyperlink
11 from the Description back to the Diagram.⁸ Google claims that it produced both the Diagram and
12 the Description in 2011 and an updated version of the documents prior to the court’s January 8
13 order.⁹

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15 Dunbar seeks to enforce the court’s order because he believes that Google has not produced
16 the document titled “Gmail ad targeting and data flow” and that it has not produced all versions of
17 either the Diagram or the Description.¹⁰ As to his contention that “Gmail ad targeting and data
18 flow” refers to documents other than the Description, Dunbar offers primarily his suspicion that
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21 ³ See Docket Nos. 215, 248.

22 ⁴ See Docket No. 244.

23 ⁵ See Docket No. 265.

24 ⁶ See Docket No. 265 Ex. 2; *see also* Docket No. 244 Exs. C, D (filed under seal).

25 ⁷ See Docket No. 265 Ex. 2.

26 ⁸ See *id.*

27 ⁹ See Docket No. 265; *see also* Docket No. 244 Exs. A, C (filed under seal).

28 ¹⁰ See Docket No. 244.

1 other documents exist. He points to Google’s failure to clarify earlier that the title is just a
2 hyperlink to the Description and to the updated version of the Description to suggest that Google
3 has other documents with this title. But Dunbar offers no evidence beyond his suppositions that
4 there are other, absent documents, and Google states that it has no other documents with that link
5 attached or with that title. Absent some showing by Dunbar that there in fact other documents that
6 Google has not produced, Google is in compliance with the court’s January 8 order and so granting
7 Dunbar’s motion is inappropriate.
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9 Dunbar’s second assertion – that Google has not produced prior versions or updated
10 versions of the Diagram or the Description – has more traction. Google produced updated versions
11 of both documents on January 7.¹¹ According to Google, any past versions of the documents were
12 not saved as separate files because they were continuously updated, and so the new versions were
13 saved over the old versions.¹² But Google apparently refuses to certify that no prior versions exist
14 because the documents were routinely sent to various employees and so someone may have a copy
15 of an earlier version, but it does not have anything other than the latest version of the document.¹³
16 While at the hearing Google suggested to the court that it has identified custodians who may have
17 an earlier version it has not established that it successfully located any earlier versions. Google
18 also maintains that the attorney-client privilege protects any versions produced before it shared the
19 documents with parties other than its in-house counsel.¹⁴
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21 Google asserts that it has no obligation to retain these past versions of the Diagram and the
22 Description because they were altered in the normal course of business. Although pursuant to Fed.
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25 ¹¹ See Docket No. 265.

26 ¹² See *id.* Ex. 2.

27 ¹³ See Docket No. 244; Docket No. 265 Ex. 2.

28 ¹⁴ See Docket No. 265.

1 R. Civ. P. 37(e), the court “may not impose sanctions under these rules on a party for failing to
2 provide electronically stored information lost as a result of the routine, good-faith operation of an
3 electronic information system,” the court is concerned that Google appears to have failed to take
4 steps to preserve documents that could have been discoverable in this case even after litigation
5 commenced.¹⁵ Given that “[a]s soon as a potential claim is identified, a litigant is under a duty to
6 preserve evidence which it knows or reasonably should know is relevant to the action,”¹⁶ Google’s
7 failure to retain older versions of the documents as they were being amended is problematic.
8 Dunbar filed this action in 2010 and requested these documents, and Google produced the
9 documents, in 2011.¹⁷ Google thus had plenty of notice that these two documents were relevant to
10 Dunbar’s case.
11

12 Nevertheless, because nothing in either Dunbar’s papers or Google’s opposition suggests
13 that the failure to preserve prior versions of the documents was the result of a “culpable state of
14 mind” that supports a finding of spoliation,¹⁸ the court does not find that either a further order to
15 enforce or sanctions are warranted. Google nevertheless shall identify any potential custodians of
16 previous versions of the documents over which it does not maintain a claim of privilege and
17 produce such versions within fourteen days.
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19 **IT IS SO ORDERED.**

20 Dated: April 2, 2013

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22 PAUL S. GREWAL
23 United States Magistrate Judge

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25 ¹⁵ See *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 888 F. Supp. 2d 976, 990 (N.D. Cal. 2012); *Zubulake*
26 *v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

27 ¹⁶ *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006).

28 ¹⁷ See Docket No. 1; Docket No. 265 Ex. 2.

¹⁸ See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).