

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ERICH SPECHT, an individual and doing business)	
as ANDROID DATA CORPORATION, and THE)	
ANDROID’S DUNGEON INCORPORATED,)	
)	Civil Action No. 09-cv-2572
Plaintiffs-Counterdefendants,)	
v.)	Judge Harry D. Leinenweber
)	
GOOGLE INC.,)	Magistrate Judge Jeffrey Cole
)	
Defendant-Counterclaimant.)	

**PLAINTIFFS’ RESPONSE TO
GOOGLE’S MOTION TO COMPEL PLAINTIFFS TO
RESPOND TO GOOGLE’S INTERROGATORY NO. 12**

Plaintiffs, Erich Specht, an individual and doing business as Android Data Corporation, and The Android’s Dungeon Incorporated, by their attorneys, Novack and Macey LLP, submit this Response to Google’s Motion to Compel Plaintiffs to Respond to Google’s Interrogatory No. 12.¹

1. On Thursday, April 15, 2010, counsel for Plaintiffs conducted a meet and confer with Google’s counsel concerning their request that Plaintiffs supplement their answer to Interrogatory No. 12 with a list of “all persons expected to testify on behalf of Plaintiffs at trial.”

2. During the meet and confer, Plaintiffs’ counsel explained that they do not know -- nor are they required to guess -- what witnesses they “expect to testify” at trial at this early stage. As a compromise, Plaintiffs’ counsel offered to exchange Rule 26(a)(1)(A)(i) disclosures of all individuals believed to have discoverable information. Google rejected that offer.

¹ Google’s Motion has been improperly noticed. Local Rule 5.3(a)(1) requires that motions and notices thereof be filed no later than 4:00 p.m. the second business day prior to presentment. However, Google filed its Motion after 5:30 p.m. on April 20, 2010 and its Notice of Motion one day later -- on April 21, 2010, the morning before presentment. As such, the Motion should be denied for this reason alone.

3. Plaintiffs' counsel then asked if Google would be willing to identify the witnesses it may call at trial if Plaintiffs provided the same information to Google. That proposal too was rejected.

4. Plaintiffs remain willing, as a compromise, to either: (a) exchange Rule 26(a)(1)(A)(i) disclosures; or (b) exchange a list of those witnesses that the parties may call at trial.

5. However, Google's demand for a list of witnesses that Plaintiffs "expect" to call at trial is premature. Rule 26(a)(3) requires a party within 30 days before trial, or as otherwise ordered by the Court, to provide separate lists of: (a) each witness the party "may call" if the need arises; and (b) those witnesses the party "expects to present." At this stage, it would be premature to compel the parties to exchange anything more than their "may call" witness lists. Indeed, courts have recognized that parties are not entitled to demand through interrogatories the identity of witnesses parties intend or expect to call at trial in light of Rule 26(a)(3), which provides for such information to be exchanged later as part of the pre-trial process. E.g., Banks v. Office of the Senate Sergeant-at-Arms, 222 F.R.D. 7, 15-16 (D.D.C. 2004); Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 42 (D. Md. 2000); Chiperas v. Rubin, No. CIV.A.96-130, 1998 WL 531845, *1 (D.D.C. Aug. 24, 1998).

6. None of Google's cases support the idea that it is appropriate -- let alone required -- that "will call" witness lists should be exchanged during discovery. See Vodak v. City of Chicago, 2004 WL 1381043, at *2 (N.D. Ill. May 10, 2004) (requiring party to provide a list of witnesses it "may call at trial" 60 days prior to discovery cut off) (emphasis added); Fisher v. Baltimore Life Ins. Co., 235 F.R.D. 617, 628 (N.D. W. Va. 2006) (requiring Plaintiff only to identify those persons who "may be a possible witness" at trial). Google's parenthetical

references to the holdings in these cases is simply contrived. Contrary to Google's suggestion, neither case stands for the proposition that parties should be required during discovery to identify those witnesses that are "expected" or "intended" to be called at trial.²

7. For the foregoing reasons, Plaintiffs' response to Google's Interrogatory No. 12 is sufficient, and Google's Motion to compel Plaintiffs to identify in response to that Interrogatory all witnesses "expected to testify on behalf of Plaintiffs at trial" should be denied.

ERICH SPECHT, an individual and doing
business as ANDROID DATA
CORPORATION, and THE ANDROID'S
DUNGEON INCORPORATED

By: /s/ P. Andrew Fleming
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² Google's final case, Amari Co., Inc. v. Burgess, 2009 WL 1292860, at *3-4 (N.D. Ill. May 7, 2009) has no application here. In Burgess, plaintiff conceded that an interrogatory requesting him to identify witnesses he expected to testify at trial had not been answered sufficiently. The only issue that was decided in that case was whether a supplemental answer cured the prior deficiency.

CERTIFICATE OF SERVICE

P. Andrew Fleming, an attorney, certifies that he served the foregoing by causing a true and correct copy to be delivered by the ECF system to:

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on this 21st day of April, 2010.

/s/ P. Andrew Fleming
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