

**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,	)	
	)	
Plaintiffs/Counter-Defendants,	)	
v.	)	Civil Action No. 09-cv-2572
	)	
GOOGLE INC.,	)	Judge Harry D. Leinenweber
	)	
Defendant/Counter-Plaintiff.	)	

**MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

Plaintiffs Erich Specht, an individual and doing business as Android Data Corporation and The Android’s Dungeon Incorporated, by and through their attorneys, hereby move this Court, pursuant to Fed. R. Civ. P. 15(a) and 20(a)(2), for leave to file the Third Amended Complaint a copy of which is attached hereto as Exhibit A, without exhibits. In support hereof, Plaintiffs state as follows:

1. On April 28, 2009, Plaintiffs filed their Complaint for Trademark Infringement naming Google and numerous other defendants. On June 4, 2009, Plaintiffs filed their First Amended Complaint (“FAC”) again naming Google and numerous other defendants. On August 3, 2009, the Court dismissed the FAC as to all defendants other than Google without prejudice and granted Plaintiffs leave to file a second amended complaint. Among other things, the Court found that Plaintiffs needed to allege more factual detail concerning the nature of the other defendants’ involvement in the alleged infringing activity. The Court did not set a deadline for Plaintiffs to file the second amended complaint.

2. On October 6, 2009, Plaintiffs filed their Second Amended Complaint (“SAC”), which asserted five claims against Google: (a) trademark infringement under the Lanham Act

(Count I); (b) unfair competition under the Lanham Act (Count II); (c) violation of the Illinois Deceptive Trade Practices Act (Count III); (d) common law trademark infringement (Count IV); and (e) contributory infringement (Count V).

3. On February 23, 2010, the Court ordered that: “Parties to file amended pleadings by 7/15/2010.” (Dkt. 174.)

4. Plaintiffs filed a Third Amended Complaint on July 13, 2010 (the “TAC”), believing such amendment to be in compliance with the Court’s February 23, 2010 Order. The TAC asserted the same five claims against Google as in the SAC in Counts I-V. The TAC also added four new defendants to the case -- T-Mobile USA, Inc., Sprint Nextel Corporation, Cellco Partnership d/b/a Verizon Wireless and AT&T Mobility LLC (together, the “Carrier Defendants”) -- and asserted against them in Counts VI-IX the same causes of action asserted against Google in Counts I-IV.

5. Plaintiffs added the Carrier Defendants to the TAC because of information learned in discovery. On July 9, 2010, at the deposition of Andy Rubin, the manager of the Android Platform for Google, Rubin identified the four Carrier Defendants as the principal wireless carriers who sell Android mobile devices and provide wireless service for those devices. One of those carriers, AT&T Mobility LLC, only began selling Android mobile devices and associated wireless services within the past several months.

6. Plaintiffs have no choice but to pursue their claims against the Carrier Defendants because Google has taken the surprising position in discovery -- critically, in the Rule 30(b)(6) depositions taken within the past week -- that it earns essentially no revenue from the Android Platform. Google likewise is refusing to provide Plaintiffs with any information concerning its

advertising revenues earned from the use of Android mobile devices, even though its own employees account for such revenues on “Android P&L” statements.

7. At the outset of this case, Google attorneys boasted that with regard to the Android Platform, there was “somewhere between . . . \$400 to \$650, \$700 million dollars [sic] worth of products and systems . . . out there utilizing this protocol.” (May 7, 2009 Tr. at 11.) Nevertheless, Google’s own corporate representative witnesses are asserting under oath the dubious position that Google does not share in any revenue associated with these products and systems and that the revenue is earned, instead, by the Carrier Defendants and others who distribute products and services utilizing the Android Platform.

8. Plaintiffs believe they acted properly by filing the TAC within the time frame set forth in the Court’s February 23, 2010 Order, which granted the parties leave to amend the pleadings by July 15, 2010. Plaintiffs have since discussed the matter with counsel for Google, who has asserted that the TAC is improper and a “nullity” because Plaintiffs did not move for leave to file it. Accordingly, Plaintiffs file this motion in an abundance of caution, and ask the Court to grant leave to the extent such leave is required.

9. Rule 15(a) of the Federal Rules of Civil Procedure states that requests to amend pleadings should be liberally granted. Under Rule 15(a), leave to amend pleadings is freely given, unless there is undue delay, undue prejudice to the opposing party, or the amendment would be futile. See, e.g., Oil Express Nat’l, Inc. v. Burgstone, No. 96 Civ. 4816, 1998 WL 677250, at \* 1 (N.D. Ill. Sept. 22, 1998).

10. Here, the proposed amendment will not result in undue prejudice or delay or for any other improper purpose. Plaintiffs are reacting promptly to information learned from Google in discovery in this case. The Court will recall that Plaintiffs filed a motion to compel Google to

provide 30(b)(6) deposition testimony in June, because Google was preventing such discovery from proceeding until the second and third weeks of July, mere days before the deadline to amend and the close of discovery.

11. Under Rule 20(a)(2) joinder of the additional Defendants in this action is proper because Plaintiffs assert a right to relief against them that arises out of and concerns the same transactions, occurrences or series of transactions or occurrences and questions of law or fact common to all Defendants will arise in this action. Moreover, it would be wasteful and inefficient for Plaintiffs to litigate their claims against the Carrier Defendants in a separate action given the prevalent common questions of law and fact.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting Plaintiffs leave to file the Third Amended Complaint.

Respectfully submitted,

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

By: /s/ John F. Shonkwiler  
One of Their Attorneys

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**CERTIFICATE OF SERVICE**

John F. Shonkwiler, an attorney, certifies that he caused copies of the foregoing Motion for Leave to File Third Amended Complaint to be served by electronically filing the document with the Clerk of Court using the ECF system this 15th day of July, 2010.

/s/ John F. Shonkwiler