

**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.)	

**PLAINTIFFS’ REPLY MEMORANDUM IN FURTHER SUPPORT OF
THEIR MOTION FOR DISQUALIFICATION PURSUANT TO 28 U.S.C. §455**

Plaintiffs, by their attorneys, Novack and Macey LLP and Martin J. Murphy, respectfully submit this Reply Memorandum in Further Support of Their Motion for Disqualification Pursuant to 28 U.S.C. §455.

ARGUMENT

This Reply addresses three (3) issues raised by Google’s Brief Regarding Plaintiffs’ Request for Recusal (the “Response” or “Resp. at __”).

First, the Response misidentifies grounds for Plaintiffs’ motion under Section 455(b). Plaintiffs’ Motion for Disqualification Pursuant to 28 U.S.C. §455 (the “Motion”) relies on Section 455(b)(4) and (b)(5)(iii). Section 455(b)(4) requires disqualification in any of three circumstances, namely, where the Judge or his family has: (1) a financial interest in the subject matter in controversy; (2) a financial interest in a party to the proceeding; or (3) any other interest that could be substantially affected by the outcome of the proceeding. 28 U.S.C. §455(b)(4). Additionally, Section 455(b)(5)(iii) provides for disqualification if the Judge’s

family has any interest that could be substantially affected by the outcome of the proceeding, so it, too, is not limited to an interest in a current-party. 28 U.S.C. §455(b)(5)(iii).

Because AT&T is not yet a party to this action, Plaintiffs relied (for now) on the first and third prongs of Section 455(b)(4), and Section 455(b)(5)(iii). Plaintiffs made this point very clear; for instance, they explicitly stated that Section 455(b)(5)(i) does not yet apply because AT&T is not yet a party. (See Plaintiffs' Memorandum in Support of Their Motion for Disqualification Pursuant to 28 U.S.C. §455 [Dkt. No. 228], at 6 n.2.) Nevertheless, the Response addresses only the current-party prong of Section 455(b)(4) and Section 455(b)(5)(i). (Resp. at 5-6.) Because these are not the basis for Plaintiffs' motion, Google's discussion of these sections is irrelevant.

Second, the primary authority cited by Google -- In re Kansas Pub. Employees Ret. Sys. (KPERS), 85 F.3d 1353 (8th Cir. 1996) does not support Google's opposition to disqualification. Instead, KPERS supports Plaintiffs' argument that the Court should not decide the Motion to Amend and, on the collateral estoppel issue, the case is distinguishable.

The judge in KPERS was faced with three motions for intervention, one filed by a bank ("Boatman's") and two by law firms ("Blackwell" and "Shook"). Id. at 1355. The judge "*sua sponte* disqualified himself from presiding over the applications to intervene and had them reassigned to another federal district judge." Id. The judge "recused himself from deciding Boatmen's application because he owned stock in Boatmen's parent company." Id. The judge's decision to disqualify himself from deciding the motion for intervention -- i.e., whether an entity in which he had a financial interest should become a party to the lawsuit pending before him -- is remarkably similar to the situation here, where Plaintiffs maintain that the Court should not

decide whether AT&T should become a party. For this reason, KPERS further supports disqualification here.

When the motions for intervention were filed in KPERS, the judge disclosed his interest in Boatmen's and asked the parties to anonymously submit any objections to his presiding over the case. Id. KPERS did not raise any objection to the judge continuing in the case at that time. Id. at 1355-56. Nevertheless, as noted, the judge disqualified himself from ruling on the motions for intervention, including Boatmen's. When Boatmen's motion to intervene was denied, the judge resumed his involvement in the case. Approximately a year later, KPERS moved to disqualify the judge because, *inter alia*, Boatman's was the plaintiff in a separate action against KPERS. Id. at 1357.

The Eighth Circuit held that the motion to disqualify was untimely. Id. at 1359. This is because the Eighth Circuit -- unlike the Seventh Circuit -- imposes a non-statutory timeliness requirement on motions brought under Section 455. Id. at 1360 ("even though §455 has no express timeliness requirements, claims under §455 will not be considered unless timely made") (citations omitted). Conversely, the Seventh Circuit has explicitly rejected any timeliness requirement for motions under Section 455. E.g. SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977). As a result, the KPERS court's decision is based on a requirement that does not exist in the Seventh Circuit. And, the court's discussion of the timeliness of the motion to disqualify, and KPERS' alleged bad faith in waiting to bring the motion, are irrelevant.

Notwithstanding its ruling that the request was untimely, the KPERS court also discussed, in dicta, whether the judge should have been disqualified because of the potential collateral estoppel effect of rulings in the main case on the separate, Boatmen's action. KPERS, 85 F.3d at 1361. The court held that the judge did not need to be disqualified on this basis, but

not for the reasons stated in Google's Response. KPERS did not universally reject the potential for disqualification based on a related case; it just found that the issues raised in the allegedly related cases were not sufficiently similar for collateral estoppel to be applied. Id. The court noted that the claim in the Boatmen's case arose out of "separate and distinct contractual obligations" which were "not presented in the case pending before [the judge]." Id. Based on the lack of overlapping issues, the court concluded "we do not view this case as one involving potential collateral estoppel." Id.; see also Gordon v. Reliant Energy, Inc., 141 F.Supp.2d 1041, 1043 (S.D. Cal. 2001) (recognizing that, in KPERS "the Eighth Circuit declined to consider whether a judge's ruling in one case would have a collateral effect on issues in a separate case because there were no common issues remaining in the two cases") (emphasis added).

Here, the issues raised by Plaintiffs' claims against Google and Plaintiffs' claims against AT&T are identical in virtually every respect. Plaintiffs are asserting the same causes of action against AT&T as they are against Google. (Compare Third Amended Complaint [Dkt. No. 216], Counts I, II, III & IV (against Google) with Counts VI, VII, VIII & IX (against AT&T and others).) The claims are all based on Google and AT&T's use of the mark "Android" in connection with the sale and distribution of mobile devices that run on Google's Android OS. If the sale and distribution of "Android" mobile devices infringes Plaintiffs' marks, then both Google (which supplies the Android OS) and AT&T (which sells the "Android" mobile devices and supplies them wireless service) will be liable for infringement. (Id.) Likewise, the claims are both subject to the same legal defenses -- particularly the defense of abandonment, which Google says it will be presenting to this Court for decision very soon. Because the abandonment defense turns on Plaintiffs' use and intent to use its trademarks, the legal and factual issues raised thereby will be exactly the same whether the abandonment defense is raised by Google or

AT&T. Thus, while there was no commonality between the actions at issue in KPERS, here, the claims and defenses will be exactly the same. As such, KPERS' dicta regarding collateral estoppel is distinguishable.

Third, the Response devotes several pages to attacking Plaintiffs motives for raising the issue of disqualification. Plaintiffs are not seeking to delay the case -- on the contrary, Plaintiffs' believe that the delays associated with this case have been caused by Google's failure to cooperate in discovery. Regardless, Section 455 is addressed to the Court and describes when it is obligated to disqualify itself. Plaintiffs' motives (good or bad) are not relevant to the Court's determination of its obligations under that statute.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion to Disqualify, enter an Order to transfer this case to another Judge of the District Court, and award Plaintiffs any such other and further relief as is appropriate.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

P. Andrew Fleming, an attorney, certifies that he caused copies of the foregoing to be served by electronically filing the document with the Clerk of Court using the ECF system this 26th day of July, 2010.

/s/ P. Andrew Fleming