

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

SPECHT, et al.)	
)	C.A. No. 09-cv-2572
Plaintiffs,)	
)	Judge Leinenweber
v.)	
)	Magistrate Judge Cole
GOOGLE INC.,)	
)	
Defendant.)	

**GOOGLE’S MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE UNDER
FEDERAL RULE OF CIVIL PROCEDURE RULE 37(C)(1) DUE TO PLAINTIFFS’
UNTIMELY DOCUMENT PRODUCTION AND INTERROGATORY RESPONSES**

This motion addresses yet another of Plaintiffs’ schemes to stall the Court’s consideration of Google’s pending motion for summary judgment. On the eve of the close of discovery (and even after the close of discovery), and after the deposition of Erich Specht, Plaintiffs produced thousands of pages of new documents and provided new written interrogatory responses. Google suspects Plaintiffs will attempt to rely on this new discovery in response to its pending motion for summary judgment, but Plaintiffs have not provided any explanation or justification as to why this new discovery was not produced much earlier, or at the very least before Erich Specht’s deposition. Accordingly, Google moves to sanction Plaintiffs pursuant to Rule 37(c)(1) and, particularly, moves to bar Plaintiffs from relying on this newly-produced discovery in response to Google’s motion for summary judgment.

I. INTRODUCTION

This case involves Plaintiffs’ allegations that they own the mark “Android Data” (among other marks), and that Google’s Android operating system for mobile phones purportedly infringes that mark. Plaintiffs make these allegations despite the fact that Android Data

Corporation collapsed in 2002, and the fact that Plaintiffs' abandonment of the "Android Data" mark since then is readily apparent.

Plaintiffs' abandonment of their "Android Data" mark has been a central theme of the case and Google sought discovery from Plaintiffs on this issue from the very beginning. Indeed, since "use" is a cornerstone of trademark rights, Plaintiffs should be eager to provide that information. But Google and this Court have expended a substantial amount of time and effort to get Plaintiffs to provide evidence of the purported use of their own marks. Google served interrogatories, including its Interrogatory Nos. 1 and 3, specifically seeking information regarding any actual use of the mark "Android Data" - towards uncovering whether Plaintiffs had *any* evidence of actual use of their "Android Data" mark after Android Data Corporation ceased doing business and had been abandoned. While providing evidence of use of the marks would be beneficial to Plaintiffs, they initially did not provide any specific information in response to Interrogatory No. 3. (Ex. A.) When Google pressed for a supplemental response, Plaintiffs again demurred. (Ex. B.) In response, Google filed a motion to compel, where Google specifically requested *specific* information about Plaintiffs' purported use of their purported trademarks. (Rec. Doc. No. 145) The Court ordered Plaintiffs to supplement their interrogatory answers by January 7, 2010. (Rec. Doc. No. 148.) Plaintiffs provided supplemental interrogatory answers on December 22, 2010, but those too were deficient. (Ex. C.) Plaintiffs finally provided what appeared to be a complete response to Interrogatory No. 3 on February 4, 2010. (Ex. D.) Thus, it took seven months, a motion to compel, and four separate drafts of Plaintiffs' interrogatory responses to get a complete response to Interrogatory No. 3 that detailed Plaintiffs' alleged uses of their purported marks.¹

¹ As Google had suspected all along, those interrogatory responses all but admit that there had been no *bona fide* use of the marks since 2002, a matter which is the subject of Google's pending motion to compel.

While Plaintiffs’ interrogatory answers should have been complete after months of “investigation” and four separate revisions, Plaintiffs had even more time to seasonably supplement these interrogatory responses as discovery continued. The deposition of Erich Specht, the individual to which all this purported usage was tied, did not occur until July 21, 2010 -- just nine days before the close of fact discovery. Had Plaintiffs genuinely discovered new evidence of use, they could have easily disclosed that evidence before Mr. Specht’s deposition. However, no new or further evidence of purported use was disclosed prior to his deposition. Rather, Plaintiffs intentionally withheld further information and documentation in reserve.

During his deposition, Mr. Specht identified “supplementary stuff that may be coming” -- documents he had provided to his counsel at least a week or two earlier, that had not been produced to Google. (Specht. Dep., Ex. E, pp. 328-330.) Google did not receive this “supplementary stuff” until *after* Mr. Specht’s deposition during the very last days of the fact discovery period. The table below summarizes Plaintiffs’ last-minute document productions:

Date	Bates Range
7/26/2010	PL21223-PL21245
7/28/2010	PL-E00186961- PL-E00188821
7/28/2010	PL0021260-PL0022368
7/29/2010	PL0022369- PL0022449
7/30/2010	PL022447-PL0022662

In addition to the thousands of pages of last-minute document production listed here, Plaintiffs also submitted, after the deposition of Erich Specht, multiple, updated interrogatory responses, where Plaintiffs offer entirely new alleged evidence of “use” of the purported “Android Data” mark. (Exs. F, G.)

Plaintiffs' last-minute production comprised documents that it could not have produced earlier in litigation. The bulk of these documents were recent printouts of Internet webpages. Plaintiffs provided no explanation why these documents could not have been printed out sooner. The remainder of these documents were comprised of documents such as tax returns (dated in March, 2010), invoices (dated in May, 2010), handwritten notes (undated), a business license (dated May 17, 2010), correspondence between Plaintiffs and Picket Fence (dated 2009), brochures (dating back to 2000), an invoice to Picket Fence (dated in 2004), a presentation to the Palatine Democrats (from 2008), and correspondence with CFE Media (from May and June of 2010).²

Plaintiffs have not explained why documents from March, April, May and June of 2010 (and earlier) could not have been produced before Mr. Specht's deposition. Nor have they explained why documents purporting to date back as far as 2000 were not produced before Mr. Specht's deposition. Google's counsel provided Plaintiffs with an opportunity to explain why their delay in producing these documents might have been justified. (Ex. H.) Plaintiffs provided no justification, and also declined to state whether they intended to rely on these last-minute documents in responding to the pending summary judgment motion. (Ex. I.) Instead, Plaintiffs conceded the relevance of these documents and interrogatory responses and their responsiveness to prior discovery by "offering" to allow Mr. Specht to be deposed again. (Id.)

II. LEGAL STANDARD

Parties have a duty to seasonably supplement their discovery responses pursuant to Rule 26(e)(1), and when they fail to do so they face the automatic exclusion sanction of Rule 37(c)(1), as well as other potential sanctions.

² Of course, Plaintiffs' last-minute production is also of the same nature of the "evidence" addressed in Google's pending summary judgment motion -- which is to say, it is not evidence of *bona fide* "use" at all.

A party who has...responded to an interrogatory...must supplement or correct its disclosure or response...in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

FED. R. CIV. P. 26(e)(1). A party's failure to properly supplement its interrogatory responses may result in sanctions:

If a party fails to provide information or identify a witness as required by Rule...26(e), the party is not allowed to use that information...to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard...may order payment of the reasonable expenses, including attorney's fees, caused by the failure;...may inform the jury of the party's failure; and...may impose other appropriate sanctions.

FED. R. CIV. P. 37(c)(1). Further, a court may rely on its inherent power to sanction a party. *Barnhill v. U.S.*, 11 F.3d 1360, 1368 (7th Cir. 1993).

The exclusionary sanctions of Rule 37(c)(1) are "automatic and mandatory." *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). The opposing party may only avoid the automatic and mandatory sanctions by showing that "its violation of Rule 26(a) was either justified or harmless." *Id.* When evaluating whether a failure to disclose was substantially justified or harmless, a Court should consider: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003.)

III. ARGUMENT

The Court should exclude Plaintiffs' last-minute document production and written discovery responses pursuant to Fed.R.Civ.P. 37(c)(1). "Use" is the touchstone of demonstrating trademark rights, and Plaintiffs' utter lack of "use" has always been and remains a central issue in this case. It took a motion to compel and no less than *four* drafts of Plaintiffs' interrogatory

responses to get a straight answer to a number of Google's interrogatories. Now Plaintiffs have submitted supplemental answers to those interrogatories setting forth a number of new positions that *could have been disclosed long ago*. Plaintiffs have provided no explanation whatsoever as to why this information was not disclosed earlier in discovery. As a result, Plaintiffs' failure to timely disclose evidence of use in an interrogatory response or supplementary production is a "material" deficiency that triggers sanctions under Rule 37(c).

Plaintiffs violated Rule 26(e) by failing to timely supplement their interrogatory responses and/or produce documents. The documents and interrogatory responses submitted at the close of discovery, and only after Erich Specht's deposition, all refer to information that existed months, and in some cases years, earlier. For example, Plaintiffs rely on the handing out of business cards in the years 2005, 2006 and 2007 (Ex. F, pp. 3-4), and on a website purportedly in existence from 2001 through 2005 (Id. at p. 2). Even those documents which are dated in 2010 have been in Plaintiffs' possession for months prior to Erich Specht's deposition, and there is simply no reason why they could not have been disclosed much earlier -- and at least prior to the deposition. To the extent Plaintiffs printed out thousands of pages from the internet, Plaintiffs cannot reasonably argue that this information was not available to them earlier.

Plaintiffs' last-minute production and disclosure was nothing more than a calculated effort to further delay discovery and, once again, summary judgment. Notably, Plaintiffs sought an extension of fact discovery and postponement of Mr. Specht's deposition -- which the Court denied. Having failed to provide the Court with a basis for granting an extension, it appears that Plaintiffs now seek *a de facto* extension through this late production after which they offer further depositions beyond the close of discovery. Plaintiffs had the information and documentation to produce well before Mr. Specht's deposition. Indeed, Mr. Specht testified

during his deposition that he provided counsel with additional documents at least a week prior to his testimony. Plaintiffs' withholding of these documents until *after* Mr. Specht's deposition is just a calculated attempt to unnecessarily delay this case from proceeding.

But because Plaintiffs are either unable or unwilling to provide justification for their failure to timely provide the information and documentation, neither Google nor the Court should now be required to address this new information. Fed.R.Civ.P. 37(c)(1). Indeed, there can be no substantial justification for the failure to timely produce the information and as a result these documents and supplemental discovery responses should be excluded from consideration, at least with respect to Google's Motion for Summary Judgment.

IV. CONCLUSION

For all of the foregoing reasons, Google respectfully request that this Court grant the present Motion and exclude Plaintiffs' untimely produced documents and interrogatory responses for purposes of summary judgment.

Respectfully submitted,

Dated: September 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: September 28, 2010

/Herbert H. Finn/