

**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-Counterplaintiff.)	

**PLAINTIFFS’ OPPOSITION TO GOOGLE’S
MOTION TO EXCLUDE TIMELY PRODUCED EVIDENCE**

Plaintiffs Erich Specht (“Specht”), an individual and doing business as Android Data Corporation (“ADC”), and The Android’s Dungeon Incorporated (“ADI”), by and through their attorneys, file this opposition to Google, Inc.’s Motion to Exclude (the “Motion to Exclude” or “Mot. at __.”), and show the Court as follows:

I. BACKGROUND

One of the issues raised in this case by Google is whether Plaintiffs have run a *bona fide* business. By March 2010, Plaintiffs had produced over 150,000 pages of documents, many of which documented their ongoing business operations. However, because Plaintiffs business is *bona fide* and ongoing, Plaintiffs continued to generate documents that Plaintiffs’ believe refute Google’s unfounded assertion that Plaintiffs’ business is and was a sham. Accordingly, in late July 2010 -- before the date when Google was authorized to file a motion for summary judgment -- Plaintiffs produced 3,285 additional pages to Google, and provided supplemental interrogatory responses. (Mot. at p. 3.) Additionally, since then, because Plaintiffs’ business is ongoing, they have even more evidence that they are operating a legitimate commercial operation. Indeed,

because Plaintiffs are continuing to do business, they will continue to generate such materials all the way up to trial. Plaintiffs intend to continue supplementing their discovery responses -- as is their obligation -- with such new material.

In any event, Google did not object when Plaintiffs' made their supplemental disclosures at the end of July. Then, several weeks later, Google moved for summary judgment. (See Docket No. 252.) More than three weeks after that -- and while Google knew Plaintiffs were in the midst of preparing their response to Google's summary judgment -- Google sent a letter to Plaintiffs counsel advising them that it suddenly deemed the supplemental production to be untimely because Google had not had a chance to ask Erich Specht ("Specht") about the documents at his deposition, which occurred a week before they were produced. (Mot. at Ex. H.) While Plaintiffs disagreed that supplemental production was untimely, they offered to identify for Google -- in advance -- which of the documents would be cited in Plaintiffs' response to Google's motion for summary judgment, and allow Google to depose Specht about them. (Id. at Ex. I.) Google did not respond. Instead, after waiting about two more weeks, Google filed the instant Motion.

Plaintiffs' supplemental document production and interrogatory responses were not untimely. They were provided before Google could move for summary judgment as part of Plaintiffs' ongoing obligations to supplement their discovery responses. Moreover, even if they were untimely, Google has not suffered any harm. This is shown by, among other things, the fact that Google had all of the documents weeks before it filed for summary judgment, yet said nothing. And, even after filing for summary judgment, Google delayed several more weeks before raising the issue, and ignored Plaintiffs' counsel's offer to tender Specht for another deposition that would have alleviated any alleged harm. In sum, Google knows it has not been

prejudiced; its Motion to Exclude is a pure tactical maneuver through which it hopes to get the Court to ignore relevant evidence, and which will -- at a minimum -- distract Plaintiffs' and interfere with their ability to prepare a response to Google's motion for summary judgment.

II. ARGUMENT

A. The Supplemental Interrogatory Responses

On July 30, 2010, Plaintiffs provided supplemental interrogatory responses to: (1) provide information about Plaintiffs' business operations since the prior responses were served; (2) update responses to reflect information that was discovered during preparations for depositions and/or which was disclosed during deposition; and (3) disclose more detailed information about topics that came up during depositions, but which were not pursued by Google's counsel. (Mot. at Exs. F & G.) Google seeks to have the responses excluded because they were served after Specht's deposition. (Mot. at 3.) While Plaintiffs do not believe this is appropriate -- particularly given Google refusal to take Specht's deposition -- Plaintiffs did not rely on the supplemental interrogatory responses in their Response in Opposition to Google's Motion for Summary Judgment of Abandonment (the "Response"). As such, Google's request to exclude them should be denied as moot.

B. The Supplemental Document Production

Of the 3,285 additional pages produced to Google, Plaintiffs Response cites only eight (8) pages.¹ Specifically, Plaintiffs' Response cites ADI's invoices to CFE Media LLC ("CFE") dated May 14, 2010 and July 1, 2010, as well as a check from CFE made out to ADI for payment of the May 14, 2010 invoice, consisting of a total of 3 pages. (PL 21306-08.) Additionally, the

¹ Plaintiffs do not believe they should be prevented from relying on any of the documents, but because they in fact did not rely on any other pages, Google's request to prevent Plaintiffs' from doing so should be denied as moot.

Response cites to an email Specht sent to Steve Rourke of CFE on July 23, 2010 with a proposal for “Content Syndication Service,” consisting of a total of 5 pages. (PL-E 188817-21.) These documents evidencing ADI’s ongoing business with CFE (and its use of the Android Data mark) were produced two days before the close of oral discovery. (Mot. at 3.) Nevertheless, Google did not seek to depose Specht about them, and when Plaintiffs offered to let Google do so after the close of oral discovery, Google refused.

C. More Recent Documents

As noted, Plaintiffs’ business is ongoing and continues to produce evidence that it is a *bona fide* commercial operation. As such, the Response cites further evidence of Plaintiffs’ arising out of their activities after July 30, 2010. Specifically, in September 2010, CFE accepted ADI’s July 23, 2010 proposal, and entered into a contract with ADI on September 13, 2010. The Response cites the CFE contract, ADI’s corresponding invoice and CFE payment. (See Plaintiffs’ Appendix of Summary Judgment Exhibits, at Ex. 66.) Additionally, since July 30, 2010, ADI has continued providing services to Picket Fence Realty (“PFR”). Hence, the Response cites emails from Specht to PFR dated August 10, 2010 and September 8, 2010. (*Id.* at Ex. 60.) Obviously, because all of these documents are the product of business activities that occurred after July 30, 2010, they could not have been produced before Specht’s deposition and, thus are not untimely. Nevertheless, Plaintiffs offered to let Google depose Specht about any new documents, but Google refused.

* * *

In sum, Google’s Motion to Exclude relates -- at most -- to eight pages of documents that were produced two days before the close of oral discovery, and a handful more pages that could not possibly have been earlier produced. These documents were not withheld; they were timely disclosed. The only harm alleged by Google would have been cured by taking Specht’s

deposition -- as offered twice by Plaintiffs -- but Google refused. That is because Google thinks the documents are not relevant anyway. Thus, even if these few documents were somehow deemed to have been disclosed untimely, there is no harm to Google and, hence, they should not be excluded.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court deny Google's Motion to Exclude in its entirety on the grounds that: (1) Plaintiffs' supplemental production was timely; (2) any delay in producing the documents upon which Plaintiffs' Response relies was harmless; and (3) Google's request to exclude from consideration documents and interrogatory responses which are not cited in Plaintiffs' Response is moot.

Respectfully submitted,

ERICH SPECHT, an individual, and
doing business as ANDROID DATA
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By: /s/ P. Andrew Fleming
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CERTIFICATE OF SERVICE

P. Andrew Fleming, an attorney, certifies that he caused copies of the foregoing *Plaintiffs' Opposition to Google's Motion to Exclude Timely Produced Evidence* to be served by electronically filing the document with the Clerk of Court using the ECF system this 8th day of October, 2010.

/s/ P. Andrew Fleming