

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

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

**GOOGLE’S REPLY IN SUPPORT OF MOTION TO EXCLUDE DUE TO PLAINTIFFS’  
UNTIMELY DOCUMENT PRODUCTION AND INTERROGATORY RESPONSES**

During the hearing before this Court on September 30, 2010, the Court expressly ruled that any of the late-produced information which is the subject of Google’s Motion to Exclude must be addressed by Plaintiffs only in a supplemental or “severable part of [Plaintiffs’] brief” in response to Google’s motion for summary judgment (Ex. A, p. 6). Plaintiffs did not follow the Court’s instructions.

**I. Plaintiffs’ New Evidence Regarding 2010 Business Activities Is Irrelevant.**

Plaintiffs concede that they relied on at least two of the late-produced documents (Response, pp. 3-4), but did not address any of those documents in any supplemental or severable portion of their Response Brief. Because those two documents relate solely to business activities of Specht in 2010, more than a year after the filing of this lawsuit and nearly three years after Google began using its ANDROID mark in commerce, those documents are entirely irrelevant to the issues before the Court. Thus, while the Court should exclude those documents for the reasons set forth in Google’s Motion to Exclude, even if the Court was to consider them, those documents are of no import to Google’s pending motion for summary judgment.

## **II. Plaintiffs' Handout Of Alleged "Business Cards" Were Never Disclosed During Discovery**

More concerning is Plaintiffs' statement that they "did not rely on the supplemental interrogatory responses in their Response in Opposition to Google's Motion for Summary Judgment" (Response, p. 3). Though Plaintiffs do not directly cite to their Fourth Supplemental Interrogatory Responses, they do rely on facts that were never disclosed in discovery until Plaintiffs served (after the close of business) their Fourth Supplemental Interrogatory Responses on July 30, 2010 (the last day of fact discovery). Plaintiffs' Fourth Supplemental Interrogatory Responses contained Plaintiffs' entirely new allegation that Specht purportedly gave ANDROID DATA business cards to two individuals at events held in November 2005 and November 2006, respectively (see Google's Memo. in Supp. of Motion to Exclude, Dkt. No. 262, Ex. F at p. 3). Plaintiffs now attempt to rely on these "facts" as purportedly showing evidence of Specht's use of the ANDROID DATA mark between 2002 and 2007 (see Plaintiffs' MSJ Facts, ¶¶28-29). Thus, Plaintiffs are attempting to rely on information not timely disclosed during discovery, failed to notify the Court that they were relying on new information, and failed to discuss that information in a separate brief or at least a severable portion of their Response Brief.

Plaintiffs should not be permitted to rely on information that was not timely disclosed, especially when Plaintiffs did not comply with the Court's mandated procedure that they specifically and separately address any new evidence. Nevertheless, even if the Court were to accept this evidence (and setting aside the fact that when Google inquired about business cards during depositions, Plaintiffs did not mention these events), Specht's distribution of "Android Data" business cards to two individuals years after shutting down his "Android Data" business

does not constitute *bona fide* use of the ANDROID DATA mark in commerce (see Google's Reply in Support of Motion for Summary Judgment, being filed herewith).

### **III. Plaintiffs' New Third-Party Website Printouts Are Inadmissible**

Plaintiffs' printouts from third-party websites, most notably in the form of exhibits obtained from the third-party website [www.archive.org](http://www.archive.org), were never produced during discovery, and are also unauthenticated. (Plaintiffs' MSJ Exs. 7, 13, 14, 44A, 44B, and 72.) Moreover, Plaintiffs did not address this new evidence separately as the Court mandated. Plaintiffs' attempt to sneak in this previously undisclosed evidence further demonstrates Plaintiffs' failure to comply with the Court's Order and the rules governing discovery. The Court should exclude these third-party printouts from consideration.

Plaintiffs rely on a number of screen shots from the third-party website archive.org (also known as the "Internet Archive").<sup>1</sup> Specifically, Plaintiffs' MSJ Exs. 7, 13, 14, 44A, 44B and 72 comprise, in whole or in part, printouts from the Internet Archive purporting to show the appearance of the websites [www.androiddata.com](http://www.androiddata.com), [www.sonixms.com](http://www.sonixms.com), [www.designtoscano.com](http://www.designtoscano.com) and [www.basilstreet.com](http://www.basilstreet.com) at various times between 2001 and 2005. Plaintiffs are *not* relying on their own archives and files of websites they purportedly hosted. Plaintiffs never disclosed these documents, or their intent to rely on printouts from the Internet Archive. As a result, Google did not have a chance during discovery to explore the foundation of these documents or explore the reliability of the Internet Archive's files. And significantly, Plaintiffs did not submit an authenticating declaration from the Internet Archive along with these exhibits. Thus, in addition to being unauthenticated, these exhibits should also be struck under Fed. R. Civ. P. 37(c)(1) due to Plaintiffs' failure to timely produce them during discovery.

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<sup>1</sup> The Internet Archive operates a service called the "Wayback Machine," which purports to allow a user to obtain an archived web page as it appeared at a particular moment in time. *Novak v. Tucows, Inc.*, 2007 WL 922306, \*5 (E.D.N.Y. Mar. 26, 2007).

Courts considering the admissibility of website screen shots from the Internet Archive have universally held that such documents are **not admissible** under Fed. R. Evid. 901 unless they are authenticated by an officer or employee of the Internet Archive (by affidavit or otherwise). *See Audi AG v. Shokan Coachworks, Inc.*, 592 F.Supp.2d 246, 278 (N.D.N.Y. 2008) (declaration of paralegal insufficient to authenticate search results from [www.archive.org](http://www.archive.org), because “such evidence may only be authenticated by a knowledgeable employee of the website”); *Novak*, 2007 WL 922306 at \*5 (plaintiff’s declaration insufficient to authenticate screen shots obtained from [www.archive.org](http://www.archive.org), because plaintiff “proffer[ed] neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages”); *St. Luke’s Cataract and Laser Institute, P.A. v. Sanderson*, 2006 WL 1320242, \*2 (M.D.Fla. May 12, 2006) (declarations of fact witnesses insufficient to authenticate screen shots from [www.archive.org](http://www.archive.org); party seeking to rely on such evidence must “provide the Court with a statement or affidavit from an Internet Archive representative with *personal knowledge* of the contents of the Internet Archive website”). *Cf. Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 WL 2367740, \*6 (N.D.Ill. Oct. 15, 2004) (finding screen shots from the Internet Archive properly authenticated by an affidavit from an employee of the Internet Archive).

Because Plaintiffs fail to provide an affidavit or testimony from a person having personal knowledge regarding the operation of the Internet Archive, Plaintiffs’ MSJ Exs. 7, 13, 14, 44A and 44B are not properly authenticated and therefore inadmissible. Further, the declaration testimony from Erich Specht and Philip Cacioppo regarding those exhibits<sup>2</sup> should likewise be

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<sup>2</sup> See Specht Decl., Plaintiffs’ MSJ Ex. 1, at ¶¶5, 8 (regarding [www.androiddata.com](http://www.androiddata.com)) and ¶12 (regarding [www.designtoscano.com](http://www.designtoscano.com) and [www.basilstreet.com](http://www.basilstreet.com)); Cacioppo Decl., Plaintiffs’ MSJ Ex. 44, at ¶¶5-6 (regarding [www.sonixms.com](http://www.sonixms.com)).

struck from the record as lacking appropriate foundation -- these printouts are, again, not from Erich Specht's or Philip Cacioppo's files, but from a third party's files. The respective declarations do not explain how these witnesses are, in 2010, able to authenticate a third party's archive of their respective websites from many years ago.

#### **IV. Conclusion**

Accordingly, for the reasons set forth above, Google respectfully requests that the Court strike from the record and give no consideration to the information and materials which Plaintiffs have relied on in opposing Google's Motion for Summary Judgment, that were not timely produced during discovery.

Respectfully submitted,

Dated: November 2, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I electronically filed the foregoing GOOGLE'S REPLY IN SUPPORT OF MOTION TO EXCLUDE DUE TO PLAINTIFFS' UNTIMELY DOCUMENT PRODUCTION AND INTERROGATORY RESPONSES with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: November 2, 2010

/s Herbert H. Finn