

**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 RESPONSE TO PLAINTIFFS’ MOTION TO STRIKE GOOGLE’S LR56.1 STATEMENT OF UNCONTESTED FACTS AND CERTAIN SUPPORTING EXHIBITS

Defendant GOOGLE INC. (“Google”), by and through its undersigned attorneys, hereby responds to Plaintiffs’ “Motion to Strike Google’s Statement of Uncontested Material Facts in Support of Motion for Summary Judgment and Certain Exhibits” (“Motion to Strike,” Dkt. No. 277). For the reasons set forth below, this Court should deny Plaintiffs’ Motion to Strike in its entirety.

I. PLAINTIFFS’ REQUEST TO STRIKE GOOGLE’S LR56.1 STATEMENT OF FACTS IN ITS ENTIRETY IS UNJUSTIFIED

Plaintiffs first request that this Court strike Google’s LR56.1 Statement of Uncontested Material Facts (“Google’s Facts,” Dkt. No. 256) in its entirety, on the basis that Google did not include “a description of the parties” or “facts supporting venue and jurisdiction in this court,” as required under LR56.1(a)(1). Although not specifically denominated as such, these facts are provided in Google’s Facts. (e.g. Google’s Facts ¶¶1, 3, 5-6.) Particularly, those paragraphs set forth that Android Data Corporation and The Android’s Dungeon, Inc. are Illinois corporations operated from Mr. Specht’s home, and the types of business they conducted. While Google admittedly omitted a paragraph describing its own corporate status (as a Delaware corporation), Google has admitted these facts, as well as it being subject to venue and jurisdiction, in its

Answer and Counterclaim. (Answer and Counterclaim, Dkt. No. 136.). Any dispute as to these facts is simply nothing more than lawyer-inspired argument needlessly posed to increase costs and efforts. Accordingly, Google respectfully submits that, in view of the lack of dispute amongst the parties as to venue and jurisdiction, and in view of the fact that all except Google's own corporate status and address was included in Google's Statement of Facts, any alleged variation between Google's Statement of Facts and the Local Rules is moot.

Further, this Court has substantial discretion in the enforcement of LR56.1, and may exercise that discretion to waive the requirements of that rule in whole or in part, particularly where a violation of that rule does not materially affect the Court's ability to decide the dispositive issue in this case. *Hare v. Custable*, 2009 WL 3647045, *1 (N.D.Ill. Aug. 31, 2009); *Weyneth v. Micromatic Spring and Stamping, Inc.*, 2004 WL 1093483, *1 n.1 (N.D.Ill. May 17, 2004). Because there is no dispute as to the parties, venue and/or jurisdiction, this issue simply has no effect on the Court's ability to resolve Google's Motion for Summary Judgment. Under the circumstances that the Court finds some deficiency in Google's papers, Google respectfully requests that the Court exercise its discretion to waive compliance with those requirements of LR56.1 -- to the extent that Google's paragraphs describing the parties are not already compliant with LR56.1.

II. THE CHALLENGED SUMMARY JUDGMENT EXHIBITS ARE AUTHENTIC

Plaintiffs next request, in wholly conclusory fashion, that the Court strike Google's Summary Judgment Exhibits 5, 31, 40-41, 50-52 and 57, on the basis that Google did not authenticate them through affidavits. While Plaintiffs are correct that Google did not authenticate those exhibits by way of affidavit, it is immaterial, inasmuch as each of those exhibits is authenticated by other means. As Plaintiffs themselves note in their Motion to Strike, evidence is admissible on summary judgment if it is "identified by affidavit *or otherwise made*

admissible in evidence.” *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) (emphasis added). As set forth below, there is no genuine dispute that each of the documents in question is authentic and therefore admissible into evidence, without the need for any supporting affidavit. Plaintiffs’ complaints regarding “authentication” appear to just be a further attempt to burden the Court with unnecessary disputes.

A. Google’s MSJ Exs. 5 and 52

Google’s MSJ Exs. 5 and 52 comprise screen shots (taken on August 10, 2010 and August 13, 2010) from Plaintiffs’ current Internet website at www.android-data.com. Plaintiffs’ objection to these exhibits on the basis of authenticity is frivolous. Plaintiffs themselves submitted as an exhibit a copy of the identical screen shot from the www.android-data.com website, taken on October 5, 2010 (see Plaintiffs’ MSJ Ex. 102), which is identical to Google’s MSJ Exs. 5 and 52. Plaintiffs offer no evidence to suggest that the appearance of that website was any different in August 2010 than in October 2010. As such, Plaintiffs effectively concede that Google’s MSJ Exs. 5 and 52 are authentic.

B. Google’s MSJ Ex. 31

Google’s MSJ Ex. 31 comprises several pages of documents produced by third-party Eide & Eide, CPA (“Eide”), Specht’s accountants, bearing Bates Nos. EIDE 0000268 through EIDE 0000271, which include a note and an e-mail from Eide’s files documenting Specht’s instructions to Eide in 2003 to allow the corporate registration for Android Data Corporation to expire. Plaintiffs cannot reasonably dispute the authenticity of documents produced by their own accountants, particularly given the fact that Plaintiffs themselves have relied upon documents produced by Eide without submitting an affidavit or testimony from Eide to authenticate them (see, e.g., Plaintiffs’ MSJ Ex. 1, ¶19, citing document produced at EIDE 1853).

Moreover, Roger Eide (the principal and Rule 30(b)(6) representative of Eide) testified that this exhibit, which was marked as Ex. 8 at his deposition, came from Eide's files:

Q. The note [EIDE 0000268] says -- it's dated 11/6/03. It's somebody's handwriting. Do you know whose handwriting that is?

A. My mother Betty.

Q. So when you it [sic] says Gran at the bottom --

A. Gram. Since my kids work there, they call her Gram out of respect, and so everybody picks that up, clients and everybody.

* * * *

Q. Was this [EIDE 0000268] in your permanent file?

A. Yes.

* * * *

Q. Okay. So you discussed this with Gram, then, in preparation for your deposition?

A. Yes.

Q. What did she tell you?

A. I pulled these files out and said what do you recall of it. And she read these e-mails and she said she was replying per -- processing what Erich [Specht] told her to do. So she said outside of his, she couldn't recall anything on this e-mail but she said she did whatever Erich told her to do.

Q. Okay. So the e-mail you're referring to, the one that bears Bates 00270 --

A. Correct.

* * * *

Q. And then in November of '03, Erich reiterated that Android Data Corporation should expire. And I'm referring to the handwritten note at the top of the exhibit; is that correct?

A. This is my note. This is a note in my permanent file written by my mother of something she's discussed with Erich.

(Ex. A, Transcript from 7/7/10 Eide Dep., at 104:23 – 109:23). Mr. Eide’s testimony regarding this exhibit is more than sufficient to authenticate the note at EIDE 268 and the e-mail at EIDE 270 under Fed. R. Evid. 901(b)(1).

C. Google’s MSJ Exs. 40 and 41

Google’s MSJ Exs. 40 and 41 comprise copies of (i) a Google press release dated November 5, 2007, announcing the formation of the Open Handset Alliance (OHA), and (ii) a T-Mobile press release dated October 22, 2008, announcing the launch of the T-Mobile G1 mobile phone (manufactured by HTC). These exhibits merely serve to corroborate the following facts alleged in Plaintiffs’ own Second Amended Complaint:

33. On November 5, 2007, Google announced the formation of the Open Handset Alliance (the “OHA”), a partnership or business alliance consisting of dozens of firms that include...

60. In September 2008, HTC launched the first Google-branded phone, known as the G1 with T-Mobile after spending more than \$10 million and almost three years in development. The handset is manufactured by Taiwan’s HTC Corp. and features Qualcomm’s dual-core MSM7201A semiconductor with integrated processing, multimedia, graphics capabilities and multi-mode 3G mobile broadband connectivity.

(Second Amended Complaint, Dkt. No. 134). Plaintiffs’ objection to these press releases on the basis of authenticity is again frivolous. Allegations in a complaint are binding admissions. *Morequity, Inc. v. Naeem*, 118 F.Supp.2d 885, 894 (N.D.Ill. 2000) (citing *Jackson v. Marion County*, 66 F.3c 151, 153 (7th Cir. 1995)). Plaintiffs’ own allegations constitute sufficient evidence to support a finding that these exhibits are authentic. Fed. R. Evid. 901(a).

Moreover, Plaintiffs cannot contradict their own complaint in an attempt to create a disputed issue of material fact. *See Indiana Ins. Co. v. Ehrlich*, 880 F.Supp. 513, 519 (W.D.Mich. 1994) (finding that no issue of fact existed regarding defendant’s status as a subcontractor where the plaintiff’s complaint alleged that the general contractor “subcontracted

with Defendant”); *Stefanik v. Friendly Ice Cream Corp.*, 183 F.R.D. 52, 53-54 (D.Mass. 1998) (noting that a plaintiff is “bound by the averments of his pleadings” and “is simply not permitted to offer, without explanation, evidence directly contradicting the allegations of his own complaint, in the face of a motion for summary judgment”).

D. Google’s MSJ Exs. 50 and 51

Google’s MSJ Exs. 50 and 51 comprise official transcripts prepared by a court reporter (Lisa Bar-Leib of Veritext Reporting) of (i) a voicemail message left by Kenneth Robblee with Erich Specht on April 20, 2009, and (ii) a voicemail message left by Robblee with Google on or about the same date. Specht testified at deposition that the transcript of Ex. 50, which was marked as Ex. 10 at his deposition, was an authentic transcription of the voicemail message that Robblee left for him and which he produced to Google in discovery:

Q. And then he [Robblee] left a voice mail on your cell phone later?

A. That same day [April 20], yes.

Q. And that is the voice mail that you produced in this case?

A. That is.

* * * * *

Q. I’m handing you what I’ve marked as E. Specht Exhibit 10. This is a transcript of the voice mail you’ve provided to us in discovery we’ve had typed up by a court reporter. Could you read through it and confirm that that is, in fact, a transcript of the voice mail you’re referring to.

A. Yes, this looks like the -- the message that he -- he left for me.

(Ex. B, Transcript from 7/21/10 Specht Dep., at 146:17-22, 155:12-22). Specht’s testimony regarding Google’s MSJ Ex. 50 is more than sufficient to authenticate it under Fed. R. Evid. 901(b)(1).

With regard to Ex. 51, when Google deposed Mr. Robblee in November 2009, he confirmed that a transcript prepared by Google (Robblee Dep. Ex. 12A, attached as Ex. C hereto) was an accurate transcription of the voicemail that he left with Google in April 2009:

Q. Mr. Robblee, I've placed before you what's been marked as Defendant's Exhibit 12A. It's a transcript that we attempted to make of a disc that we're going to be playing of the recording that you -- of the voice mail you left at Google. If you'd like to follow along, we'll have a few questions for you afterwards. Mr. Finn, if you'd go ahead and play the voice mail.

(Audio recording played.)

Q. Okay. Mr. Robblee, were you able to hear the tape-recording of the voice mail?

A. Yes.

Q. And were you able to follow along with the transcribed version of it?

A. Yes.

Q. Did it appear to track it pretty accurately, sir?

A. Yes.

Q. Okay. Can you confirm for the record, Mr. Robblee, that that, in fact, was your voice that we heard on that disc recording?

A. Yes.

Q. And is that the message that you left with Google on one of these calls --

A. Yes.

Q. -- that you've identified on your call log?

A. Yes.

(Ex. D, Transcript from 11/5/09 Robblee Dep., at 111:24 – 113:1). As the Court can readily ascertain by comparing them, the “unofficial” transcript which Mr. Robblee confirmed was accurate (Ex. C) is substantially identical to Google’s MSJ Ex. 51. However, to the extent that the Court finds that Mr. Robblee’s testimony is not sufficient to authenticate Google’s MSJ Ex.

51, Google respectfully requests leave to withdraw that exhibit and replace it with the attached Ex. C (Robblee Dep. Ex. 12A) which Mr. Robblee authenticated.

E. Google's MSJ Ex. 57

Google's MSJ Ex. 57 comprises an April 30, 2009 article by Elizabeth Woyke from the website www.forbes.com, which was marked as Ex. 3 at the deposition of Martin Murphy on April 8, 2010, and which quotes a number of statements made by Mr. Murphy to Ms. Woyke regarding Plaintiffs' motivation in filing this lawsuit. Mr. Murphy testified that he had reviewed that article shortly after it was published:

Q. Let's start with the Forbes article, which is Murphy Exhibit 3. Have you seen this article before?

A. Yes.

Q. When did you first see it?

A. I don't recall. Sometime after April 30th.

Q. Did you speak with Elizabeth Woyke?

A. Yes.

* * * *

Q. Do you recall if you read this article sometime shortly after its publication date of April 30th, 2009?

A. I don't recall the exact date I read it. I'm sure it was, you know -- I mean, it may have been a day, a week, a month. I don't recall.

Q. Probably not more than a month, though?

A. Probably not. I don't know.

* * * *

Q. Mr. Murphy, the statements in this article, did you review them when you read the article?

A. I read the article.

Q. You read the article, right?

A. I read the article.

(Ex. E, Transcript from 4/8/10 Murphy Dep., at 123:4 – 124:2, 134:19-24). Mr. Murphy’s testimony that he read the article shortly after its publication is more than sufficient to authenticate it under Fed. R. Evid. 901(b)(1). Further, the Forbes.com article is self-authenticating under Fed. R. Evid. 902(6) (“Printed materials purporting to be newspapers or periodicals” are self-authenticating).

III. CONCLUSION

For the reasons set forth above, Google respectfully requests that the Court deny Plaintiffs’ Motion to Strike in its entirety.

Respectfully submitted,

Dated: November 2, 2010

/s Herbert H. Finn
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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing GOOGLE'S RESPONSE TO PLAINTIFFS' MOTION TO STRIKE GOOGLE'S LR56.1 STATEMENT OF UNCONTESTED FACTS AND CERTAIN SUPPORTING EXHIBITS 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

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