

**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.)	

**MARTIN MURPHY AND PLAINTIFFS MOTION TO STRIKE GOOGLE’S MOTION
FOR SANCTIONS UNDER 28 U.S.C. § 1927**

NOW COME Martin Murphy, one of the attorneys for Plaintiffs, and Plaintiffs Erich Specht, an individual and doing business as Android Data Corporation and The Android’s Dungeon Incorporated (collectively, “Plaintiffs”), and respectfully move this Court to strike Google’s Motion For Sanctions under 28 U.S.C § 1927 [ECF 214].

1. Attorney fees should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. *Roadway Express, Inc. v. Piper et al.*, 447 U.S. 752 (1980). Accordingly, should the Court decide not to strike Google’s motion in its entirety, then Martin Murphy and Plaintiffs request that a hearing be held on the record at a time convenient to the Court for the purposes of examining the pertinent witnesses on the record and presenting evidence in their defense.

2. Google’s motion is an abusive trial tactic aimed at shifting fees to counsel, forcing Plaintiffs to give up their appeal rights, and allowing Google to claim victory by default. Google concedes that it won’t be able to collect fees from Plaintiffs, so it is trying to saddle counsel with the fees and coerce the attorneys to force Plaintiffs to settle. (See, for e.g. Google’s

Memorandum at page 17: “Plaintiffs have little or no assets to satisfy the mandatory award of costs pursuant to Rule 54(d), let alone judgment for attorney fees.” [ECF 318]).

3. Google’s tactics are responsible in part for co-counsel withdrawing from this case and is a complete fabrication made for an improper purpose and is sanctionable under FRCP Rule 11 and 28 U.S.C. § 1927. Plaintiffs are asking that this Court sanction Google’s attorney, Mr. Finn, for bringing this abusive, harassing, and fabricated motion.

4. In addition to be being brought for an improper purpose, Google’s motion for sanctions under 28 U.S.C. § 1927 is insufficient as a matter of law as set forth more fully below.

I. THE COURT DOES NOT HAVE INHERENT POWER TO AWARD SECTION 1927 SANCTIONS AGAINST PARTIES IN LANHAM ACT CASES.

5. Despite the plain reading of the statute, “Any attorney...who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct, Google is seeking attorney fees under § 1927 against Plaintiffs.

6. However, [e]ight years before the fee provision [15 U.S.C. § 1117(a)] was added to the Lanham Act, the Supreme Court held that attorneys’ fees could not be awarded in cases under the [Lanham] Act. *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 964-965 (7th Cir. 2010). [The] reasoning is consistent with interpreting the Lanham Act’s “exceptional case” provision as having the same substantive content as the inherent power held inapplicable to Lanham Act Cases. *Id.*

7. Thus, attorney fees may not be awarded against a plaintiff under 28 U.S.C. § 1927.

II. Liability under § 1927 is restricted to the wrongdoer.

8. Most of Google's motion is directed at what it perceives as wrongful acts by the Plaintiffs. As set forth above, attorney fees may not be awarded against a plaintiff under § 1927. Google is asking that attorney fees be awarded against Plaintiffs as well as all of the attorneys as a whole, but § 1927 does not operate that way. Liability under § 1927 is direct, not vicarious. *FM Industries, Inc. v. Citicorp Credit Services, Inc.*, 614 F.3d 335, 340-341 (7th Cir. 2010) (citations omitted).

9. Liability is restricted to the misbehaving lawyer and may not be transferred to his partners, law firm [or co-counsel]. *Id.*

III. Liability under Section 1927 only applies to excess costs and attorney fees.

10. Section 1927 does not apply to all costs and fees nor does it allow fee shifting from the parties to the attorneys. *Citicorp* at 340-341.

11. It is impossible to respond to Google's motion in that it fails to separate out fees and costs it is seeking against Plaintiffs from costs and fees it seeks against the attorneys

12. The motion also fails to specify exactly what amount Google is claiming as "excess costs and fees."

IV. GOOGLE'S MOTION IS FRIVOLOUS AND BEING PURSUED FOR AN IMPROPER PURPOSE

13. Should the Court consider entertaining Google's motion for sanctions, then the following are Martin Murphy and Plaintiffs responses to Google's allegations:

a. Moving for a temporary restraining order and preliminary injunction, despite admittedly having no legal basis for either, only to later withdraw them both;

RESPONSE: Plaintiff moved for a TRO and Preliminary Injunction to preserve the status quo and stop Google from saturating the market with ANDROID marked goods and services. At the time the motion was filed, there were approximately 1 million

ANDROID devices sold. Today, Google activates over 350,000 devices per day or 10 million per month. On the first Court date, Plaintiff's counsel informed the Court that one thing that could stop Plaintiff from pursuing the TRO and preliminary injunction would be what size bond would be required and requested the Court's guidance on that issue (May 7, 2009 Transcript pp. 5-6). Google's counsel, Mr. Harris, seizing on what Plaintiffs admitted could be a weakness, stated that:

MR HARRIS: What we are looking at, potentially, in the balance of hardship, we are looking at somewhere between, it is estimated \$400 to \$650, \$700 million dollars worth of product and systems that are out there using this protocol. (Id. at p. 11). For irreparable harm we have 18 months of watching this particular mark rolled out, utilized, adopted, and partnered up by 47 other companies. (Id.) Finally, with regard to a bond that would have to be filed in this case to cover balance of hardship, so to speak, we are looking at something on the order of a [TARP] check...(Id. at 12).

On the second court date, May 21, 2009, Plaintiff's counsel, again, clearly stated to the Court and Google that Plaintiff's only concern would be what size bond the Court would require. (May 21, 2009 Transcript at page 4). This prompted the following exchange with Google's counsel:

MR. HARRIS: There are millions of products out there that when you fire them up specifically say, Powered by Android, or talk about the Android OS or operating system, or software. (Id. p. 5)

THE COURT: What would it cost Google to change the name of the - - of whatever it is that they are publishing? (Id. p. 9)

MR. HARRIS: I can account for equipment. The Court may recall I referred to a check the size of a tarp installment the other day when we were last before you. I know of equipment that bears the mark as being driven by the software in the marketplace right now of at least approximately \$500 to \$600 million dollars, hundreds of thousands of users of the software going into additional versions, additional software, application software, that they create because it is open source software. We are probably looking between \$1.2 to \$1.3 billion dollars that is involved that would probably cost, I would imagine, \$30 to \$50 million dollars minimum to address in terms of correction. Id. at pp. 9-10).

THE COURT: That would be just changing the name or would it be - -(Id. p. 10).

MR. HARRIS: Just changing the name on the equipment, respecifying new sources, and – (Id.)

Plaintiff chose not to pursue the TRO because the Developer’s challenge had already taken place (June 4, 2009 Transcript page 9). Plaintiff also decided to forgo the preliminary injunction because of the large number of infringers and the size of the bond that would be necessary. As set forth clearly in the record, the decision to withdraw the motion was due to Google’s attorney, Mr. Harris, insisting on a billion dollar plus bond and for the purpose of moving the case along and saving the Court and attorneys time. (Id.)

Interestingly, though, most of Mr. Harris’ representations to the Court were denied by Google in its answer to the Second Amended Complaint. Accordingly, Mr. Harris should be compelled to testify at the hearing on this motion so that he can be questioned regarding the inconsistencies between what he told the Court and what Google is telling the Court.

- b.** Demanding early depositions of Google employees, including Google’s founders and co-chairmen, Larry Page and Sergey Brin, even though neither Mr. Page or Mr. Brin were involved in Google’s selection or adoption of its Android trademark.

RESPONSE: According to discovery provided by Google, and the deposition of Andy Rubin, Page and Brin were involved in the branding decision. They were two of only eight people at the Android Naming meeting. They personally participated in the purchasing decision. As the highest ranking officers at the meetings, in the negotiations, and at Google, they have direct responsibility for approving the

ANDROID branding decision. Either, Mr. Page or Mr. Brin should be compelled to testify at the hearing so that they may be questioned regarding the inconsistent position Google is now taking.

- c. Attempting to add individual former and current Google employees as Defendants in this action;

RESPONSE: In granting the motion to dismiss the four individuals, the Court held that: “A plaintiff seeking to hold an officer personally liable must make a “special showing” that the officer acted “willfully and knowingly,” such as by “personally participat[ing] in the manufacture or sale of the infringing article (acts other than as an officer). [ECF 113 at page 10]. At the time the Court made its ruling, Plaintiffs only had hearsay evidence of the individuals’ participation. The extent of their real involvement wasn’t known until discovery was almost completed. For example, according to the Stock Purchase Agreement (“SPA”), the four individuals sold Android to Google in their own personal capacity and received and are receiving payments via wire transfers into their personal accounts. Also, according to the SPA, Rubin was the only officer of Android Inc.. None of the other individuals were officers or employees of Android, Inc.. The purchase price for Android was \$71 million with \$12 million up front and \$59 million payable as Google achieved certain milestones. The final milestone was due when 50 million phones were sold. The four individuals should be compelled to testify at the hearing regarding inconsistencies between the discovery tendered, Google’s motion, and the representations made by them in their declarations attached to the motion to dismiss the FAC wherein they represented that they have taken no actions in their personal

capacity. In addition, Android, Inc. was named by Plaintiffs as a party, because Google lists it as a subsidiary of Google. The SPA also stated that Android, Inc. would be operated as a subsidiary. However, Google apparently never set it up to operate in that capacity. Andy Rubin should be compelled to appear to answer questions regarding discrepancies between what he told the Court and what the discovery actually shows.

- d. Retaining additional contingency counsel for the sole purpose of driving up the costs of litigation;

RESPONSE: Why would anyone suing Google want to drive up the costs of litigation? And, more importantly, why would contingency counsel want to raise its out of pocket costs when the only chance of getting paid is with a favorable ruling? Obviously, Google's counsel has the parties reversed. Google's lawyers are getting paid every month and have no desire to see the payday end. So they file frivolous motions like this one to drive up litigation costs, unnecessarily burden Plaintiff's counsel, and attempt to drive a wedge between Plaintiffs and its counsel. Plaintiff retained additional counsel, on the advice and desire of his counsel, for the purpose of moving the case along not to drive up the costs of litigation. If anything, having additional counsel saved valuable attorney time and court resources in reduced response times and quicker discovery turnover.

- e. Refusing to handle even the simplest negotiations in good faith, such as the entry of a protective order;

RESPONSE: Plaintiff's counsel objected to a protective order because they knew Google would abuse it which Google did. Google identified every single

page of e-discovery as confidential, highly confidential, and attorney eyes only regardless of the documents content. Google produced several thousand blank sheets of paper, its “open source” code, and screen shots from web pages – all labeled confidential.

- f. Attempting to hide their lack of documents supporting Plaintiffs’ claims of continuous use by producing hundreds of thousands of pages of irrelevant documents;

RESPONSE: This accusation hardly merits a response, except to say why didn’t Google attach any of these documents to the motion and why does the number of irrelevant documents practically exceed Plaintiff’s entire Production. According to the Declaration of Google’s attorney, Cameron Nelson, attached to Google’s bill of costs, Plaintiffs produced a total of 206,846 pages of documents. So is Google alleging that none or only 6,846 pages were relevant or requested? Obviously, Google is concerned with wasting the Court and Plaintiff’s counsel’s time with this trumped up charge. Google should be ordered to produce these hundreds of thousands of documents, in open Court, at its own expense, so that the relevance of the documents in question can be explained.

- g. Refusing to provide timely and complete responses to Google’s written discovery.

RESPONSE: Anytime Google felt that it had not received a document it was entitled to, Google filed a motion and Plaintiffs immediately complied with the Court’s order. Google on the other hand, rarely complied with Orders of the Court including an order to assist with obtaining the deposition of Christopher White even though they were in contact with White’s California lawyer and even though they claimed, at White’s deposition, that they still represented White.

Google failed to comply with the Court's order regarding Google's privilege log. Google failed to inform Plaintiffs that many of the witnesses on Google's witness list were no longer employed by Google and may not be represented by them including: Linda Tong, Sung Hu Kim, Rich Miner, Tom Moss, and Erick Tseng.

h. Withholding documents until after all depositions were completed and fact discovery was set to close.

RESPONSE: Most of the documents that were produced at the end of discovery were documents related to Google's infringement and not Plaintiffs use. They were documents that Google should have, but didn't provide.

i. Pursuing various irrelevant third party depositions and subpoenas;

RESPONSE: Google's attorneys interfered with virtually every third party citation. Google inadvertently provided Plaintiffs counsel with an un-redacted copy of its July invoice to Google. The invoice provides irrefutable evidence that Google's attorneys were orchestrating third party responses to Plaintiffs discovery requests including the deposition of White. Google's attorneys also filed frivolous motions to compel Plaintiffs attorneys to produce documents it already had wasting valuable attorney and court resources. Google should be compelled to produce all of its invoice detail to Plaintiffs attorneys in advance of the hearing so that they may be thoroughly questioned regarding this allegation.

j. Attempting to extend the close of discovery for no other purpose but to forestall Google's motion for summary judgment.

RESPONSE: The motion to stay discovery pending resolution of the Mandamus Petition was aimed at avoiding duplicative depositions not to forestall Google's motion.

- i. Attempting to add Defendants (both new and formerly dismissed) on the eve of the close of discovery in order to stall Google's motion for summary judgment

RESPONSE: Google readily admits: "As such, the only companies that have actually used the ANDROID mark in commerce are Google and a handful of phone manufacturers and mobile service providers that sell phones which run Google's Android software." (Google's Memorandum at page 18) [ECF 318]. The original and First Amended Complaint's sought to join all the parties that created and encouraged the use of Android, the OHA members as opposed to those that actually sold infringing products. After the Court dismissed all of the OHA members except Google, Plaintiffs made a decision to only join those parties that were actually using ANDROID in commerce. This could not be readily ascertained until discovery was completed. It was also subject to revision as more carriers began selling ANDROID products such as AT&T which did not begin selling products until April, 2010. The purpose of adding parties was to preserve resources of the attorneys and the Court. Adding new parties would not have forestalled Google's motion since the Court already ruled that Google could file its motion on July 30, 2010. Also, since Google had agreed to represent all of the parties, there wouldn't be any need for new counsel to get familiar with the case. Again, Google's invoices would shed light into Google's attorneys' real

motives. For example, the July invoice shows that Google needed to create a story to explain facts it had misrepresented to the Court.

- j.** Attempting, without basis, to disqualify Judge Leinenweber in order to stall Google's motion for summary judgment.

RESPONSE: Despite the fact that this is a loaded accusation, Google is wrong. As alleged by Google above, AT&T is only one of a handful of phone manufacturers and mobile service providers that sell phones which run Google's Android software. As such, AT&T and, therefore, its shareholders, profit directly from the sale of ANDROID products. What is not clear, if Plaintiffs should prevail on its appeal, is whether Google will pay any past or future licensing fees due Plaintiffs as a result of AT&T's use of the ANDROID mark. Certainly to an outsider, it could appear that an AT&T shareholder could have a financial interest in the outcome of this case. The Court also denied Plaintiffs' motion for recusal, based upon Google's attorneys' representation regarding an indemnity agreement. However, according to Google's invoice and AT&T's response to the Appellate Court, the indemnity agreement was a fiction concocted by Google's counsel to influence the Court's decision. Thus, it cannot be said that Plaintiffs concerns were without basis. Again Google's counsel, Mr. Harris and Mr. Nelson, should be compelled to explain the inconsistencies between what was told to the Court and what the documents show.

- k.** Plaintiffs sued the 47 OHA members to create nuisance value.

RESPONSE: The original complaint named the 47 OHA partners, including Google, and the OHA partnership. It is common practice that a lawsuit may be

commenced against a partnership and its partners. General partners are jointly and severally liable for the acts of a partnership. Since the OHA is not a limited partnership, it is a general partnership. Thus, all of the partners are liable for the actions of the partnership and their partners. The Court dismissed the OHA because Rubin's misrepresented what the OHA was in his Declaration attached to Google's motion to dismiss the FAC. However, throughout the discovery, including Rubin's deposition, it is clear that the OHA is a partnership and the OHA members are Google's "Partners." Together, the partners created Android and the partners share in the rewards. There was no advantage to Plaintiffs in naming 47 defendants. They were all named to avoid finger pointing. When the Court announced that Google would be responsible for everyone, it made things much less complicated and Plaintiffs concentrated on those parties selling or distributing Android as opposed to those creating and packaging Android goods for sale.

Wherefore, Plaintiffs and Martin Murphy, move this Honorable Court for an Order striking Google's Section 1927 sanction petition. If the Court denies, the motion to strike, then Martin Murphy and Plaintiffs, ask that the Court conduct a hearing on the record; order Google's attorneys to produce all of its complete un-redacted invoices to Plaintiffs' attorney; and compel the attendance of Larry Page or Sergey Brin, Andy Rubin, and Google's attorneys, Herbert Finn, Richard Harris, Jeffrey Dunning and Cameron Nelson to attend the hearing and be questioned on the record regarding the allegations in Google's motion; and an Order granting Plaintiffs such other and further relief as is appropriate under the circumstances including the fees associated with responding to this motion.

Respectfully submitted,

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

By: /s/Martin J. Murphy

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CERTIFICATE OF SERVICE

Martin J. Murphy, 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 April, 2011.

 /s/ Martin J. Murphy