

**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 INC.'S MOTION AND SUPPORTING MEMORANDUM FOR A  
PROTECTIVE ORDER REQUIRING PLAINTIFFS TO DESTROY ATTORNEY  
CLIENT PRIVILEGED/WORK PRODUCT IMMUNE INFORMATION  
INADVERTENTLY PRODUCED BY GOOGLE**

Google moves for a protective order under Fed. R. Civ. P. 26(c) that bars Plaintiffs from making any further use of an unredacted invoice from Google's counsel Greenberg Traurig to Google that contains attorney-client privileged and work product immune information that was inadvertently disclosed to Plaintiffs, and which Plaintiffs confirmed was destroyed. Google inadvertently produced the unredacted invoice last September. Within hours of the inadvertent disclosure, Google notified Plaintiffs of the mistake and Plaintiffs affirmed that they had destroyed all copies of the unredacted invoice. Despite that assurance, Plaintiffs retained a copy of the document and are now apparently prepared to rely upon it to support a baseless argument in response to Google's pending motion for attorneys' fees and sanctions (Dkt. No. 314). Because both the Protective Order entered by this Court and Fed.R.Civ.P. 26(b)(5)(B) prohibit Plaintiffs from using the unredacted invoice, the Court should require Plaintiffs to live up to their promise to destroy the unredacted invoice, and prohibit any further use of the unredacted invoice.

## **I. BACKGROUND**

On June 25, 2010, this Court sanctioned Plaintiffs and their counsel Andrew Fleming for improper behavior during the April 8, 2010 deposition of Martin Murphy (Dkt. No. 215).<sup>1</sup> As a sanction for their counsels' misconduct, Plaintiffs were ordered to make Mr. Murphy available for a second deposition, with all costs and reasonable attorney's fees to be paid by Plaintiffs (Id. at pp. 17-18).

Google deposed Mr. Murphy again on July 30, 2010. On September 24, 2010, Google's counsel was seeking payment of the costs and attorney's fees associated with that second deposition, and sent Plaintiffs' counsel (including Mr. Fleming and Mr. Murphy) an e-mail transmitting what was intended to be a redacted copy of Greenberg Traurig's August 18, 2010 invoice to Google -- reflecting the attorney's fees incurred by Google for Mr. Murphy's second deposition (Ex. A, sent Sept. 24, 2010 at 9:37 am). Google's counsel inadvertently attached an unredacted copy of the invoice, instead of a redacted copy of the invoice, to the email.

Google's counsel discovered this error within a few hours and immediately e-mailed Plaintiffs' counsel:

It has come to our attention that the e-mail sent to you this morning inadvertently included as an attachment an unredacted copy of Greenberg Traurig's August 18, 2010 invoice to Google, rather than the redacted version that we understood was sent. Please be advised that the invoice comprises the confidential litigation work product of Greenberg Traurig and Google, and its transmittal was entirely inadvertent and unintentional.

Accordingly, we request that you immediately delete all electronic copies of that invoice that may currently reside in your computer system(s), and we will provide a replacement redacted copy shortly. Please respond at your earliest convenience with your acknowledgement that you have deleted all electronic copies of that invoice. (Ex. B, sent Sept. 24, 2010 at 1:38 pm).

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<sup>1</sup> Mr. Murphy, who was deposed as a fact witness regarding his business dealings with Plaintiffs, also is an attorney representing Plaintiffs in this action -- and indeed is the only remaining attorney of record for Plaintiffs after the Court permitted Mr. Fleming and his firm to withdraw from representation (Dkt. No. 308).

One of Plaintiffs' attorneys confirmed via e-mail that "all copies of the unredacted invoice in *our* possession have been deleted and/or destroyed" (Ex. C) (emphasis added). Plaintiffs' co-counsel Martin Murphy received a copy of that email. (Id.) Upon receiving this email, Google took Plaintiffs' counsel at their word and believed this matter to be resolved.

Accordingly, Google was appalled when it read Plaintiffs' recently-filed "Motion to Strike Google's Motion for Sanctions Under 28 U.S.C. §1927" ("Motion to Strike," Dkt. No. 333). In that motion, Plaintiffs rely on the inadvertently produced, unredacted invoice<sup>2</sup> they promised to destroy, to support their meritless arguments as to why Plaintiffs and their counsel should not be sanctioned<sup>3</sup> (Motion to Strike pp. 9-11).

## **II. THIS PROTECTIVE ORDER GOVERNING THIS CASE REQUIRES RETURN OF THE UNREDACTED INVOICE**

The Protective Order entered by the Court governing the exchange of information and documents in this case protects the parties from the inadvertent disclosure of privileged information. It provides:

If a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or work product immunity, the producing party may give written notice to the receiving party that the document is subject to a claim of attorney-client privilege or work product immunity and request that the document be returned to the producing party. **The inadvertent disclosure of any privileged documents shall not be deemed a waiver of that privilege as to the inadvertently disclosed documents or any other documents, testimony or evidence.**

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<sup>2</sup> There is no question that the unredacted invoice was inadvertently produced by Google's counsel, as Plaintiffs and Mr. Murphy have acknowledged the inadvertency of the production in the Motion to Strike at page 9 ("Google inadvertently provided Plaintiffs [sic] counsel with an un-redacted copy of its July invoice to Google.").

<sup>3</sup> Plaintiffs use the invoice to argue that Google was somehow "orchestrating" third party responses to subpoenas, that Google somehow misrepresented facts to the Court, and that Google's counsel purportedly "concocted" an indemnity agreement. These arguments are simply wrong and do not merit any further discussion.

(Dkt. No. 169, ¶24, emphasis added). Thus, the Protective Order explicitly provides for the unqualified right of return of inadvertently produced privileged information. Google duly exercised that right by requesting that all copies of the unredacted invoice be destroyed. Plaintiffs did not object to that request and, indeed, assured Google that they had destroyed all copies of the unredacted invoice. Nothing in the Protective Order authorizes Plaintiffs to retain copies of the document, or to use the document in further proceedings.

### **III. RULE 26(b)(5)(B) ALSO PROHIBITS ANY USE OF THE UNREDACTED INVOICE**

Even if Plaintiffs had not expressly promised to destroy the unredacted invoice, they would have been obligated to seek the Court's input prior to any attempt to use that document. Rule 26(b)(5)(B) expressly sets out a procedure for resolving claims of inadvertent production of privileged or immune materials:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified;** and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(emphasis added).

Accordingly, if Plaintiffs wished to challenge Google's request that the unredacted invoice be destroyed, they were obligated to present the matter to the Court "promptly" and "under seal." Fed.R.Civ.P. 26(b)(5)(B). Plaintiffs violated nearly every aspect of this Rule. First, they failed to "promptly" (or ever) bring a dispute regarding the unredacted invoice to the

Court's attention<sup>4</sup>. Id. Second, they "used" the information/document without first seeking a ruling from the Court. Id. Third, they failed to present the unredacted invoice to the Court under seal. Id. Fourth, having failed to seek a Court determination regarding this document, Plaintiffs failed to "return, sequester, or destroy the specified information." Id.

While Plaintiffs apparently now contend that the unredacted invoice is not subject to a claim of privilege or immunity, they long ago waived that argument. Plaintiffs never brought a motion before this Court seeking a ruling to that effect, and even actively misled Google by affirmatively stating that all copies had been destroyed. Plaintiffs cannot now challenge whether the unredacted invoice contains privileged or work product information.

In open Court, Plaintiffs' counsel Mr. Murphy argued that while he agreed to destroy, and did in fact destroy the email with the document, he did not ever agree to destroy or not use the paper copy of the document (Ex. D, April 28, 2011 Transcript, p. 11-12). Of course, this argument is beyond frivolous -- and clearly not what was represented to Google and its counsel.

Furthermore, Rule 26(b)(5)(B) imposes an affirmative obligation on each party to "retrieve" any copies of an inadvertently produced document which have been disseminated; clearly, the drafters of the Rule intended for the Rule to reach third parties if necessary (subject to "reasonable steps"). Mr. Murphy is counsel of record, of course, and not a third party. But even if he were a third party, "reasonable steps" would include his own compliance with an email on which he was copied. Mr. Murphy simply has no excuse for not destroying this document or the privileged information it contains. Even if he were to argue that he merely intended to preserve the document, Rule 26 explicitly provides that it is the producing party's (i.e. Google, not Mr. Murphy's) obligation to preserve the document.

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<sup>4</sup> Of course, Plaintiffs did not advise Google that there even was a dispute as to the document. Instead, they assured Google that the document had been destroyed.

Plaintiffs' conduct, and especially that of Mr. Murphy, is simply inexcusable. Plaintiffs affirmatively represented that the unredacted invoice was destroyed, and Mr. Murphy, in particular, agreed, at least through his failure to contradict that representation. Further, he explicitly violated every aspect of Rule 26(b)(5)(B) in addressing this matter. And Mr. Murphy did all of this while he is the subject of a motion for sanctions under 28 U.S.C. § 1927. This is regrettably just one more example of Mr. Murphy's disregard for the Court and the Federal Rules. Sanctions for this conduct would be wholly appropriate, but as the Court is already considering a broader sanctions motion regarding Mr. Murphy's conduct during this litigation, Google simply requests that his behavior here be taken as but one more example of his continuing improper and vexatious conduct. In the meantime, the Court should order Mr. Murphy to destroy all copies of the unredacted invoice and prohibit Plaintiffs from making any use of it or the information it contains.

#### **IV. CONCLUSION**

For the reasons set forth hereinabove, Google requests that this Court enter a protective order under Rule 26(c), ordering Plaintiffs to destroy all copies of the unredacted invoice, and prohibiting Plaintiffs from making any further use of that document or the information it contains.

Dated: May 9, 2011

Respectfully submitted,

/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 INC.'S MOTION AND SUPPORTING MEMORANDUM FOR A PROTECTIVE ORDER REQUIRING PLAINTIFFS TO DESTROY ATTORNEY CLIENT PRIVILEGED/WORK PRODUCT IMMUNE INFORMATION INADVERTENTLY PRODUCED BY GOOGLE with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: May 9, 2011

/s Herbert H. Finn