

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-Counterdefendants,)

v.)

GOOGLE INC.,)

Defendant-Counterplaintiff.)

Civil Action No. 09-cv-2572

Judge Harry D. Leinenweber

**P. ANDREW FLEMING AND NOVACK AND MACEY'S
RESPONSE IN OPPOSITION TO GOOGLE INC.'S
MOTION FOR ATTORNEY'S FEES AND SANCTIONS**

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P. Andrew Fleming (“Mr. Fleming”) and Novack and Macey LLP (the “Firm”) file this Response in Opposition to Google Inc.’s (“Google”) Motion for Attorney’s Fees and Sanctions.

INTRODUCTION

Evidently Google believes it can throw enough aspersions against Mr. Fleming and the Firm and lump them in with Plaintiffs’ other counsel -- Martin Murphy -- to convince the Court to award sanctions against them under 28 U.S.C. § 1927 (“Section 1927”). But wishing does not make it so, particularly here where Google (or more likely, its counsel) ignores the applicable case law, plays fast and loose with the “facts” and does not come close to justifying an award of sanctions against Mr. Fleming or the Firm. Simply put, that portion of Google’s motion directed towards Mr. Fleming and the Firm fails for three reasons:

- First, the Firm has no liability under Section 1927; it applies only to individual attorneys;
- Second, the motion fails to articulate exactly what it is that Mr. Fleming did that multiplied the proceedings in the case unreasonably and vexatiously; and
- Lastly, even the conduct that Google does complain of that might relate to Mr. Fleming is not sanctionable under Section 1927.

What is most ironic is that Google nowhere complains (nor could it) that Mr. Fleming or the Firm served interrogatories in excess of those permitted by the Federal Rules of Civil Procedure; or that Mr. Fleming or the Firm sought to delay the case by seeking more depositions than those allowed by the Rules; or that Mr. Fleming or the Firm ignored a Court scheduling order to delay the case; or that Mr. Fleming or the Firm engaged in some “‘inexcusable’ abuse of opposing counsel,” or a “lack of cooperation” “in obeying [Court] orders,” or “indifference to the [Court’s] advice and admonishments,” or “repeated attempts to delay the proceedings,” or “a failure to follow the rules of proper procedure.” In re Mann, 311 F.3d 788, 794 (7th Cir. 1972)

(App. A, Order of Hon. Harry D. Leinenweber). Indeed, Mr. Fleming participated in no such conduct, and the Section 1927 motion against the Firm and Mr. Fleming must, therefore, be denied.

ARGUMENT

By Order dated April 28, 2011, this Court stated that Mr. Fleming and the Firm need only respond to the Section 1927 portion of Google's motion. (Dkt. No. 336.) That response follows.

I. Legal Standard

Section 1927 provides that:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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.

The court's discretion in awarding sanctions should not be exercised lightly. Section 1927 does not generally abrogate the American Rule requiring litigants to bear their own attorneys' fees. Boksa v. Keystone Chevrolet Co., 553 F. Supp. 958, 962 (N.D. Ill. 1982). According to the Seventh Circuit, "it is the law of this circuit that the power to assess costs on the attorney involved 'is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly process of justice.'" Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789, 795 (7th Cir. 1983) (quoting Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968)) (emphasis added); see Boksa, 553 F. Supp. at 962 (a court is empowered to impose sanctions under Section 1927 only for abuse of the judicial process).

Further, Section 1927 permits an attorney to be sanctioned only when that attorney both: (1) multiplies the proceedings; and (2) does so in a vexatious and unreasonable fashion. Overnite Transp., 697 F.2d at 794. It is not enough that an attorney's conduct multiplies the

proceedings or is unreasonable. The conduct must multiply the proceedings and be both vexatious and unreasonable. “[T]he good faith filing of a claim supported by an arguable legal theory will not be viewed as ‘vexatious.’ The term ‘vexatious’ is defined as ‘lacking justification and intended to harass.’” Id.

Therefore, it is well-settled that sanctions under Section 1927 may only be awarded when a lawyer has demonstrated subjective or objective bad faith. Moriarty v. Svec, 429 F.3d 710, 722 (7th Cir. 2005); Kotsilieris v. Chalmers, 966 F.2d 1181, 1184 (7th Cir. 1992). Ordinary negligence alone is not enough to demonstrate objective bad faith. Pac. Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113, 120 (7th Cir. 1994); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984) (“before a court may assess fees under [S]ection 1927, the attorney must intentionally file or prosecute a claim that lacks a plausible legal or factual basis.”). Here, there is nothing to show that Mr. Fleming subjectively or objectively engaged in any vexatious and unreasonable conduct that multiplied proceedings in this case. Google’s motion must be denied.

II. Section 1927 Applies Only To Individual Attorneys

Google seeks sanctions against the Firm and Mr. Fleming.¹ The Firm, however, cannot be liable under Section 1927. The law is unambiguous on this point. Section 1927 applies only to individual attorneys, not law firms. See United Stars Indus., Inc. v. Plastech Engineered Prods., 525 F.3d 605, 609 (7th Cir. 2008) (citing Clairborne v. Wisdom, 414 F.3d 715, 724 (7th Cir. 2005)); accord Vasquez v. Cent. States Joint Bd., No. 04 C 1798, 2009 WL 562306, at *2 (N.D. Ill. Mar. 3, 2009); see Wielgo v. Commonwealth Edison Co., 127 F.R.D. 135, 145 n.19 (N.D. Ill. 1989) (“Section 1927 imposes only lawyer . . . liability”). By reason of the foregoing, Google’s Section 1927 motion against the Firm must be denied.

¹ See Google’s Memorandum in Support of Its Motion for Attorney’s Fees and Sanctions (“Mem.”), at 20-22.

III. Mr. Fleming's Conduct Is Not Sanctionable

When it comes to Mr. Fleming, Google's motion is long on hyperbole, but short on specifics. For example, it is easy to claim that Mr. Fleming engaged in "contumacious discovery conduct" (Mem. at 20), but Mr. Fleming was never cited for contempt by the Court, nor did Google ever seek such a sanction. Similarly, while Google notes that "Mr. Fleming appeared at court hearings, corresponded with Google's counsel, and defended depositions[]" (*id.*), the motion makes no effort to identify which hearings, which correspondence and which depositions it complains of; nor does it articulate what Mr. Fleming did at any particular court hearing or deposition, or said in any correspondence evidencing that he multiplied the proceedings in this case unreasonably and vexatiously.² Simply stated, the motion does not satisfy the burden imposed on Google to obtain sanctions against Mr. Fleming and should be denied for this reason alone.³

* * *

The Court can stop here and deny the motion for the reasons stated. However, even if the Court considered the conduct the motion presents concerning Plaintiffs, as demonstrated below, none of it justifies sanctioning Mr. Fleming.

A. Many of Google's Complaints Are About Events That Preceded Mr. Fleming's Appearance In This Case

Google's request for sanctions is based largely on conduct that allegedly occurred before Mr. Fleming filed his appearance on September 1, 2009. (Dkt. No. 119.) No lawyer at the Firm

² Google should not be allowed to use its reply brief to try and remedy its failure to cite specific acts of Mr. Fleming and thereby deny him any opportunity to respond.

³ The memorandum identifies the sanctions entered against Mr. Fleming in connection with his defense of Mr. Murphy's first deposition, but it would be particularly inappropriate to sanction Mr. Fleming again for the identical conduct the Court already dealt with.

had any involvement in the case prior to those dates. Google's allegations concerning events that preceded Mr. Fleming's appearance obviously cannot be the basis of Section 1927 sanctions.

Those allegations include the following:

- Google claims that Plaintiffs' "attempted to harass senior Google executives" by noticing and moving to compel their depositions. (Mem. at 6, 9-10.) This refers to Plaintiffs' Motion for Leave to Take Certain Depositions (Dkt. No. 114) filed on August 12, 2009, and denied on August 18, 2009, all before Mr. Fleming filed his appearance. Plaintiffs did not notice depositions of any Google executives after that.
- Google claims that Plaintiffs' "named dozens of unnecessary defendants." (Mem. at 7.) This refers to the Complaint and First Amended Complaint, which were filed on April 28 and June 4, 2009, respectively -- months before Mr. Fleming filed his appearance. After Mr. Fleming appeared, Plaintiffs filed a Second Amended Complaint that named only Google as a defendant.
- Google claims that Plaintiffs "moved for a TRO and preliminary injunctive relief with no basis." (Id. at 7-8.) This refers to a motion that Plaintiffs filed on May 4, 2009 (Dkt. No. 6) -- again, before Mr. Fleming filed his appearance.
- Google claims that Plaintiffs "alleged preposterous damages amounts" in the First Amended Complaint. (Mem. at 9.) That pleading was filed in June 2009, before Mr. Fleming filed an appearance. The Second Amended Complaint (Dkt. No. 134) did not seek damages in any specific dollar amount but, rather, "in an amount to be determined at trial."

B. Other Google Complaints Have Nothing To Do With Mr. Fleming

1. Specht's Deposition Testimony

Google argues that Specht identified previously undisclosed "contracts" and "verbal license agreements" at his deposition. (Mem. at 14.) Regardless of whether this dispute concerning Specht's testimony is best explained as a semantic dispute (e.g., regarding what kind

of agreement constitutes a “license”), a memory failure by the witness, a failure of comprehension by Google or a combination of these factors, there is no claim that Mr. Fleming engaged in any alleged misconduct in connection with that deposition testimony. Accordingly, this cannot be the basis for any Section 1927 sanctions.

2. Plaintiffs’ Motion To Reconsider

Google avers that Plaintiffs filed a “meritless” motion to reconsider certain aspects of the Court’s Opinion. (Dkt. No. 303.) This argument has nothing to do with Mr. Fleming. Mr. Fleming moved to withdraw on the same day that the motion to reconsider was filed (see Dkt. Nos. 302, 305), and neither he nor any other lawyer at the Firm was involved in the preparation or filing of the motion.⁴

C. Plaintiffs’ Suit Had Merit

Citing the Court’s summary judgment opinion (the “Opinion”), Google claims Plaintiffs’ lawsuit was “meritless” and allegedly the product of “false declarations, resurrected corporations and other improper actions.” (Mem. at 4, 5, 20.) However, the Court’s Opinion does not support the notion that Plaintiffs’ case was somehow contrived or so lacking in merit that Mr. Fleming should be sanctioned. In fact, as the Opinion acknowledged, Plaintiffs submitted abundant evidence in support of their summary judgment filings (Dkt. Nos. 270-76) demonstrating their use of the trademarks in commerce. Specht v. Google, Inc., No. 09 C 2572, 2010 WL 5288154, at *2-3, 22 (N.D. Ill. Dec. 17, 2010).⁵

⁴ See Declaration of P. Andrew Fleming (“Fleming Dec.”) ¶ 3, a copy of which is Exhibit A in the Appendix filed herewith.

⁵ See Plaintiffs’ Response to Google’s Statement of Uncontested Material Facts (Dkt. No. 271), at 25-33 & 40-45, for a summary account of Plaintiffs’ use of their “Android” trademarks.

In the Opinion, the Court disregarded substantial portions of Plaintiffs' evidence. For example, because the Court found as a matter of law that Google's use of the mark "Android" began in November 2007 -- although the first Android mobile device was not sold until about a year later -- it disregarded all evidence of Plaintiffs' use of their marks in commerce after that date, including in December 2007, February 2008 and February 2009. *Id.* at *14-15, 22. Under the Lanham Act's definition of "use in commerce," such use does not occur before the good or service in question is sold, transported or rendered in commerce. 15 U.S.C. § 1127. The case law applying Section 1127 is universally to the same effect,⁶ including this Court's opinion recognizing that advertising, "in the absence of an actual good or service in commerce, is insufficient" to establish use in commerce under Section 1127. *Specht v. Google, Inc.*, 660 F. Supp. 2d 858, 863-64 (N.D. Ill. 2009). No one disputed that the first Android mobile device was not on the market until October 2008.⁷ Thus, Plaintiffs had a good faith basis to pursue summary judgment. While Mr. Fleming may disagree with the Court's analysis, he is not re-arguing the issue here. The point is that it is disingenuous for Google, having prevailed on pivotal disputed

⁶ Even Google relied on this very case law in successfully arguing to this Court that: Press releases, advertisements and the like do not comprise a "use in commerce," as such materials do not evidence use of a trademark in connection with any goods or "documents associated with the goods or their sale." *See Morningside Group Ltd. v. Morningside Capital Group, L.L.C.*, 182 F.3d 133, 138 (2nd Cir. 1999) ("Mere advertising and promotion of a mark in this country are not enough to constitute 'use' of the mark 'in commerce,' so as to bring the activity within the scope of the Lanham Act."); *T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1372, 1375-76 (Fed. Cir. 1996) (noting that press releases and promotional materials bearing the mark do not qualify as "use of commerce").

See Memorandum of Law in Support of Motion by Google, Inc., Android, Inc., Andrew Rubin, Nickolas Sears, Richard Miner and Christopher White to Dismiss Plaintiffs' First Amended Complaint, at 7-8. (Dkt. No. 75.)

⁷ E.g., Google's Statement of Uncontested Material Facts (Dkt. No. 256), at ¶ 46 & Ex. 41.

issues such as this one, to now claim that Plaintiffs had “no evidence” to begin with, or that its theory had no legal basis.

Google claims that Specht submitted a “fraudulent declaration” to the USPTO (Mem. at 4-5), but that has nothing to do with Mr. Fleming; and Google presents no facts demonstrating that Mr. Fleming knew the declaration was “fraudulent.” Nor could it. Google made the same allegation in Count IV of its Counterclaim, but never proved the allegation and ultimately dismissed Count IV. Google also has the facts wrong. It argues that Android’s Dungeon Inc.’s (“ADI”) Section 8 Declaration, attesting that the registered “Android Data” mark was in use as of April 21, 2009, relied on “a copy of the [Android Data] website from [Specht’s] computer’s internal hard drive that was not accessible to anyone but [Specht].” (*Id.* at 5.) Yet, Specht’s testimony shows that: (a) he sent the USPTO samples of Plaintiffs’ use of the registered mark that included a screenshot of the Android Data website and a screenshot of the proprietary Android Data software application; (b) the Android Data website depicted in the screenshot was an active website that was then available to the public on the Internet at www.android-data.com; and (c) the screenshot of the Android Data software -- not the website (as Google wrongly asserts) -- came from either his computer or his external hard drive of images that he previously used in promotional materials. (Specht Dep. at 288-90.)⁸

Google also asserts that Specht “executed [the Section 8 Declaration] in his wife’s name, without her authorization.” (Mem. at 5.) Specht put his wife’s name on the declaration because she was the President of ADI, the owner of the registered Android Data trademark. (Specht Dep. at 299.) Moreover, the deposition testimony that Google cites does not support its argument that this was done “without . . . authorization.”

⁸ The Specht deposition transcript is attached as Exhibit B to Google’s Memorandum.

Finally, Google wrongfully claims that Specht did something illegal -- “back filing documents” when he reinstated ADC in 2009. (Mem. at 5.) This is the same erroneous claim Google made in its summary judgment brief. As explained in Plaintiffs’ opposition brief (Dkt. No. 270 at 26-28), when Specht filed Android Data Corporation’s (“ADC”) annual reports for 2003-2008, he did what was required by Illinois law to reinstate ADC. He was not lying or falsifying records. Each annual report correctly bore the date on which he signed them. As a result, because ADC was properly reinstated, it is deemed never to have been dissolved. See 805 ILCS 5/12.45(d). This is not due to any “back-dating” or “back-filing” -- it is the law.

Most importantly, none of this has anything to do with Mr. Fleming. He did not participate in or effect any of this conduct, nor does Google demonstrate that he knew Specht did anything improper.

D. There Was Nothing Sanctionable About Plaintiffs’ Interrogatory Responses

Google claims that Plaintiffs “failed to respond to interrogatories” and, as a result, it had to file “three (3) separate motions to compel.” (Mem. at 8.) Yet, Google offers nothing in support of its argument that Plaintiffs’ interrogatory responses involved acts of “misconduct” for which Plaintiffs and their attorneys should be sanctioned. (Id.) All of Plaintiffs’ objections and responses were made in good faith and in compliance with the Federal Rules.

On June 22, 2009, Google served very broad interrogatories (the “First Interrogatories”). For example, Google sought the “complete factual basis” for Plaintiffs’ use of the Android Data mark in commerce.⁹ Plaintiffs could not provide a complete response to the First Interrogatories at that time. By the end of July 2009, Plaintiffs had gathered and produced a small quantity of hard copy documents, but had not begun to review or produce their electronically stored

⁹ A copy of the First Interrogatories is Exhibit B in the Appendix filed herewith.

information (“ESI”), which comprised the bulk of their responsive documents. Despite this, Plaintiffs responded to the interrogatories on July 31, 2009 based on the information then available to them. This all took place before Mr. Fleming filed his appearance in this case. (See Dkt. No. 119.)

Plaintiffs served a supplemental response on November 19, 2009 (the “First Supplemental Response”). Plaintiffs were still in the process of reviewing over ten years of ESI and had not yet produced any of it. Most of Plaintiffs’ ESI production took place between December 2009 and March 2010. (Fleming Dec. at ¶ 4.) The First Supplemental Response provided additional information then known to Plaintiffs and stated that, pursuant to Rule 33(d), complete answers could be ascertained by examining Plaintiffs’ business records which would be part of their forthcoming production of documents, and the burden of deriving the answer would be substantially the same for Plaintiffs as it would be for Google.¹⁰

1. Google’s First Motion To Compel

Unsatisfied, Google moved to compel. The Court directed Plaintiffs to further supplement their responses to the First Interrogatories and continued the motion. (Dkt. No. 148.) On December 29, 2009, Plaintiffs served an amended response identifying hundreds of pages of documents that supported the facts stated therein (the “Second Supplemental Response”). This response required dozens of hours of work to complete, and the documents identified contained every responsive fact Plaintiffs knew at the time that response was served.¹¹

In open court on January 7, 2010, Google’s counsel objected to the supplemental response. Plaintiffs’ counsel responded that the information Google wanted Plaintiffs to reduce

¹⁰ A copy of the First Supplemental Response is Exhibit C in the Appendix filed herewith.

¹¹ Fleming Dec. ¶ 5. A copy of the Second Supplemental Response is Exhibit D in the Appendix filed herewith.

to writing was provided in the documents that Plaintiffs had produced and identified, and that Google could ascertain the information from those documents just as easily as Plaintiffs. Nevertheless, the Court ruled that it had the discretion to require Plaintiffs to compile the responsive information from those documents and recite it in writing in an interrogatory response.¹² Plaintiffs complied with the Court's Order and, on February 4, 2010, served their Third Supplemental Response to the First Interrogatories, which was 28 pages long and contained extensive data compiled from Plaintiffs' documents.¹³

2. Google's Second Motion To Compel

Months later, Google demanded that Plaintiffs supplement their response to First Interrogatory No. 12 with a list of "all persons expected to testify on behalf of Plaintiffs at trial," (Dkt. No. 188 at ¶ 1), even though the discovery cutoff was months away -- July 30, 2010 -- and no trial date had been set. (See Dkt. No. 239.) During a meet and confer, Plaintiffs' counsel explained that they did not know, nor were they required to guess, what witnesses they "expected to testify" at trial months before the close of discovery. (Dkt. No. 188 at ¶¶ 5, 6.) Indeed, Rule 26(a)(3)(A)(i) only requires a party within 30 days before trial, or as otherwise ordered by the Court, to separately list witnesses the party "may call" if the need arises; and witnesses the party "expects to present." As a compromise, Plaintiffs' counsel offered to exchange Rule 26(a)(1)(A)(i) disclosures of all individuals believed to have discoverable information. (Dkt. No. 188 at ¶ 2.)¹⁴ Google rejected that offer. Plaintiffs' counsel then asked if Google

¹² See Transcript of Proceedings dated Jan. 7, 2010, at 21. (Dkt. No. 240.)

¹³ A copy of the Third Supplemental Response is Exhibit E in the Appendix filed herewith.

¹⁴ The Court had not requested any Rule 26(a) disclosures.

would be willing to identify the witnesses it may call at trial if Plaintiffs provided the same information to Google. That proposal too was rejected. (Id. at ¶ 3.)

Google then moved to compel Plaintiffs to name the witnesses Plaintiffs expected to call (the “Second Motion”). Plaintiffs responded (Dkt. No. 188), and although the Court’s minute order reflects that the motion was “granted in part and denied in part” (Dkt. No. 191), the Court agreed with Plaintiffs and ordered the parties to exchange “may call” witness lists, not the “will call” witness list requested by Google in the Second Motion.¹⁵

3. Google’s Third Motion To Compel

Google served six additional interrogatories on January 14, 2010 (the “Second Interrogatories”). By agreement, Plaintiffs served their response on March 1, 2010, and thereafter supplemented their response on April 20, 2010 (“Supplemental Response to Second Interrogatories”).¹⁶ Interrogatory No. 13 of the Second Interrogatories asked Plaintiffs to:

Identify each instance of which Plaintiffs are aware in which any person was confused, mistaken or deceived as to the affiliation, connection or association of Google with any of the Plaintiffs and/or any of the Plaintiffs with Google due to Google’s use of the mark ANDROID.

Plaintiffs objected that Interrogatory No. 13 contained vague, ambiguous and undefined terms, and that the interrogatory was premature because the likelihood of confusion would be the subject of expert discovery which had not been conducted. Google insisted that Plaintiffs answer the interrogatory without expert input and, when the parties were unable to resolve this dispute, Google filed a Motion to Compel. (Dkt. No. 199.)

¹⁵ See Transcript of Proceedings dated Apr. 22, 2010, at 9-10. (Dkt. No. 244.)

¹⁶ A copy of the Supplemental Response to Second Interrogatories is Exhibit F in the Appendix filed herewith.

Google’s motion specifically asked for an award of fees and expenses under Rule 37(a)(5)(A). (Id. at 8.) The Court granted Google’s motion under the conditions discussed in open court, but the Court did not award any fees or expenses. (Dkt. No. 205.) Plaintiffs then supplemented their response to Interrogatory No. 13 in compliance with the Court’s Order.

* * *

It is evident from the foregoing that Google’s motions to compel arose from legitimate, non-frivolous discovery disputes. Some motions were granted; some were denied in part; in fact, the Court even agreed with Plaintiffs’ position on one of the motions. There is no evidence any of these disputes were engendered vexatiously and unreasonably solely to foster delay.

E. The Court Has Addressed Google’s Request For Sanctions Relating To The Deposition Of Martin Murphy

Google notes that Mr. Fleming “was sanctioned for misconduct during the deposition of [Martin] Murphy,” but does not explain why this same conduct should now be cause for additional sanctions. (Mem. at 10.) There is no basis for Google’s suggestion that Mr. Fleming should be sanctioned again based on this same alleged conduct.

F. Plaintiffs’ Request For Documents From Christopher White Was Reasonable

Google decries Plaintiffs attempt to obtain documents from Christopher White, a former software engineer who left Google over a year before Google adopted the Android mark. (Mem. at 10 n.6.) Plaintiffs’ request was reasonable. Before he was employed at Google, White was one of the founders and an owner of Android, Inc., the company that developed the Android operating system and sold it to Google. (E.g., Dkt. No. 75-5.) It was manifestly reasonable for Plaintiffs to believe that White had relevant ESI regarding the adoption of the Android name by Android, Inc. and Google, and/or use of the name by Android, Inc. Even the Court

acknowledged on June 17, 2010 that Plaintiffs were entitled to take White's deposition. (Dkt. No. 246 at 5.)

G. There Was Nothing Improper About Plaintiffs' Third-Party Subpoenas

Google references "burdensome and unnecessary third party subpoenas" (Mem. at 10-11 nn.7 & 8), but does not explain how serving these subpoenas imposed any unnecessary burden on Google or caused a needless delay in this case. To the contrary, the handling of these subpoenas was efficient and timely.

1. The White And Tong Subpoenas

Although Google asserts that Plaintiffs issued "multiple subpoenas" to former Google employees White and Tong "near the close of fact discovery" (id. at n.6), these subpoenas were timely and justified, and "multiple" subpoenas were issued only because Plaintiffs were unable to locate and serve the witnesses despite diligent efforts to do so.

Plaintiffs issued their subpoena to White on May 4, 2010, well before the close of fact discovery. (See Dkt. Nos. 239 & 206 at 3-4.) Plaintiffs reissued the subpoena twice thereafter because White avoided service and Google's counsel (who appeared for White earlier in the case) refused to accept service on his behalf or even confirm that Plaintiffs were attempting service at the correct address. This is explained in Plaintiffs' motion for extension of time to complete oral discovery. (Dkt. No. 206 at 3-4.) It was only after the Court told Google's counsel that Plaintiffs were entitled to depose White and asked Google's counsel to assist in scheduling the deposition that Plaintiffs' counsel finally got a call from White's California

attorney agreeing to schedule the deposition.¹⁷ Plainly, none of this delay was attributable to anything Mr. Fleming did.

Plaintiffs sought Tong's deposition because she was disclosed by Google as a potential fact witness and "affiliate" of Google who Plaintiffs could contact through Google's counsel.¹⁸ Plaintiffs served a Notice for Tong's deposition, but Google's counsel informed Plaintiffs' counsel that, contrary to its witness list, Tong was no longer with Google and could not be contacted through him. (Fleming Dec. ¶ 7.) Thus, Plaintiffs had to obtain Tong's deposition by subpoena. On July 12, 2010, counsel for Google sent Tong's last known address to Plaintiffs' counsel. Plaintiffs' counsel repeatedly attempted to serve a subpoena on Tong, both at the address provided by Google and an address obtained through independent research. (Id.) Because of these service difficulties, the Court allowed Plaintiffs leave to depose Tong after the oral discovery cut off. (Dkt. No. 236.) However, Plaintiffs were never able to locate Tong to serve her with a subpoena. (Fleming Dec. ¶ 7.)

2. The Motorola, Cisco, Apple, Verizon And GTE Subpoenas

Google argues that Plaintiffs' subpoenas to Motorola, Cisco Systems, Apple Computer, Verizon Wireless and GTE Wireless (collectively, the "Carriers") related to a "questionable damages theory," and that Plaintiffs allegedly made no effort to enforce the subpoenas. (Mem. at 11, n.7.) In fact, each of these subpoenas was warranted by the circumstances, and served and issued in compliance with the applicable Federal Rules.

¹⁷ See Transcript of Proceedings dated June 17, 2010, at 5 (Dkt. No. 246); Fleming Dec. ¶ 6.

¹⁸ See Google's May 20, 2010 witness list, a copy of which is Exhibit G in the Appendix filed herewith.

Plaintiffs subpoenaed Motorola, seeking discovery of licensing agreements between Motorola and Lucasfilm for use of the name “Droid.” (Fleming Dec. ¶ 8.) Plaintiffs maintained that any such agreement could be relevant to determining a reasonable royalty in this case. (Id.) Motorola moved to quash the subpoena. (Dkt. No. 154.) In an effort at compromise, Plaintiffs offered to limit the subpoena to three specific categories of documents. Initially, the Court granted Motorola’s motion to quash the request for licensing agreements and financial documents but denied the motion with respect to documents concerning Plaintiffs.¹⁹ Plaintiffs moved for reconsideration of the Court’s ruling regarding the licensing agreements, which was granted. Then, based on Motorola’s representation that it had no documents relating to the licensing of the Droid name, the Court denied the motion to quash that portion of the subpoena as moot.²⁰

Plaintiffs then tried to obtain licensing documents from two Verizon entities. Those entities served objections asserting that they had no responsive documents in Illinois or employees in Illinois who possessed or controlled such documents.²¹ Rather than occupy the Court’s time litigating this issue, Plaintiffs elected to seek production of the documents directly from Lucasfilm Ltd. in California. (Fleming Dec. ¶ 9.)

On March 31, 2010, Plaintiffs served subpoenas on Cisco Systems, Inc. and Apple Computer Inc. (Id. ¶ 10.) These subpoenas were extremely narrow in scope and requested only two categories of documents to assist in the calculation of a reasonable royalty. (Id.) Ultimately,

¹⁹ See Dkt. No. 174; Transcript of Proceedings dated Feb. 23, 2010, at 4-8. (Dkt. No. 242.)

²⁰ See Dkt. No. 180; Transcript of Proceedings dated Mar. 24, 2010, at 4. (Dkt. No. 243.)

²¹ Copies of the Verizon objections are Group Exhibit H in the Appendix filed herewith.

following discussions with counsel for Apple Computer, Inc. concerning information in its possession, Plaintiffs elected not to pursue a motion to compel. (Id.)

3. The Lucasfilm Subpoena

Google argues Plaintiffs “waited” too long to file a motion to compel against Lucasfilm, Ltd., “fail[ed] to comply with local rules” and made “no efforts to enforce that subpoena.” (Mem. at 11 n.8.) Google is wrong in all respects.

Plaintiffs issued two identical subpoenas to Lucasfilm out of the United States District Court for the Northern District of California. (Fleming Dec. ¶ 11.)²² Lucasfilm objected and refused to produce any documents or witnesses in response thereto. (Id.) Pursuant to Local Rule 37-1(a) of the district court and local practice, counsel for Plaintiffs and Lucasfilm conferred in an effort to resolve the dispute and then exchanged detailed written correspondence setting forth their positions on the requested discovery and citing relevant legal authority. (Id.) This process occurred over a five week period. On July 7, 2010, Plaintiffs initiated a proceeding in the Northern District of California to compel the requested discovery. (Id.) The matter was assigned to Magistrate Judge Beeler, who had a special standing order governing discovery motions. (Id.) In particular, she does not accept formal discovery motions. Instead, the Judge requires counsel to meet and confer in person and then submit a joint letter to the Court outlining the unresolved issues. (Id.) Accordingly, Plaintiffs’ motion was denied without prejudice, and Plaintiffs were required to start the process anew. (Id.) Ultimately, following discussions with counsel for Lucasfilm concerning information in its possession, Plaintiffs decided not to pursue a motion to compel. (Id.)

²² The reason for issuance of the second subpoena was that the first was inadvertently not served on Google’s counsel before service on Lucasfilm. (Id.)

4. The Subpoenas Were Issued Timely

Contrary to Google's claim, the subpoenas to the Carriers and Lucasfilm were not issued "after the deadline for the parties to serve written discovery in this case." (Mem. at 11 nn.7 & 8.) On February 23, 2010, the parties discussed a proposed discovery schedule that called for "written discovery" to close at the end of March 2010. (Fleming Dec. ¶ 12.) Plaintiffs understood that proposed deadline to apply only to written discovery between the parties. (Id.) In any event, the Court did not adopt the proposed schedule or set a deadline for written discovery. The only deadline that the Court imposed was for oral discovery to be completed by July 30, 2010. (Dkt. No. 239.) Consequently, the subpoenas were timely issued.

H. There Was Nothing Improper About Plaintiffs' Document Production

While Google complains that "Plaintiffs produced hundreds of thousands of pages of irrelevant documents[]" (Mem. at 11-12), that is exactly what Google asked for and, if it believes the production was too broad, it has only itself to blame. Plaintiffs' production was responsive to Google's 120 separate requests for production, including many extremely broad requests.²³

Moreover, Plaintiffs' production was relevant because of Google's theory of the case. Google asserted that Plaintiffs never operated a *bona fide* business; never established any rights in the asserted trademarks; and abandoned any rights they ever had due to non-use of the marks. (E.g., Dkt. No. 254 at 23-27.) A fortiori, Google compelled Plaintiffs to prove the existence and full extent of their business operations dating back to the inception of the business. Thus,

²³ E.g., "all documents . . . which record, refer or relate to each Plaintiffs [sic] respective use of the ANDROID DATA mark for each year between 1999 to date" (First Request for Production, No. 2) and "all documents . . . which include, refer or relate to any product or service sold, promoted, advertised and/or offered for sale by any person or entity in association with the term "android." (Second Request for Production No. 20.) Google's First and Second Requests are Exhibits I and J, respectively, in the Appendix filed herewith.

Plaintiffs produced substantially all documents in their possession relating to, and evidencing, their business operations since 1997. Having put Plaintiffs in that position, Google cannot be heard to complain that Plaintiffs produced “too much” proof of their business activities.

I. Plaintiffs’ Supplemental Production Is Not Grounds For Section 1927 Sanctions

Google claims that Plaintiffs made a supplemental document production before the close of discovery, and then failed to separately address this alleged “new evidence” in the summary judgment briefing as the Court ordered. (Mem. at 12.) Plaintiffs’ supplemental production was made in good faith, and Plaintiffs’ inadvertent failure to separately address a small quantity of the materials in the summary judgment briefing caused no prejudice.

Before the close of discovery, Plaintiffs provided Google with supplemental interrogatory responses and a supplemental document production. Plaintiffs had a good faith basis for supplementing, which was explained in Plaintiffs’ Opposition to Google’s Motion to Exclude Timely Produced Evidence (Dkt. No. 265), and Fed. R. Civ. Pro. 26(e) expressly required Plaintiffs to supplement these discovery responses. In short, the production principally contained documents generated as a result of Plaintiffs’ ongoing business operations. To avoid any possible prejudice to Google from the supplemental production or disclosures, Plaintiffs offered to make Specht available for a second deposition, but Google declined.²⁴

Google sought to prevent Plaintiffs from relying on any of the supplemental documents or disclosures (the “Motion to Exclude”). (Dkt. No. 261.) On September 30, 2010, the Court ruled that if Plaintiff relied on the supplemental interrogatory responses or documents in their

²⁴ Fleming Dec. ¶ 13.

summary judgment response brief, Plaintiff should discuss those materials in a severable section of the brief.²⁵

In its Opinion, the Court identified certain information that Plaintiffs relied on that should have been discussed in a severable section of the brief, including exhibits that were printouts of websites from www.archive.org. Specht v. Google, Inc., 2010 WL 5288154, at *6-8. With all due respect to the Court, those “archive.org” exhibits were not part of the supplemental document production. Because they were not the subject of Google’s Motion to Exclude, Plaintiffs did not understand them to be subject to the Court’s September 30 Order.

Plaintiffs’ summary judgment response did rely, however, on eight pages from Plaintiffs’ supplemental production that were not discussed in a severable section of Plaintiffs’ response brief. This omission was wrong, but inadvertent. In fact, confirming that Plaintiffs had no ill intent, Plaintiffs’ opposition brief -- which was filed together with Plaintiffs’ summary judgment response -- specifically identified by Bates numbers each of those eight pages that Plaintiffs believed were subject to the September 30 Order. (Dkt. No. 265.)

J. Plaintiffs Did Not “Stall” Or Otherwise Prolong The Case

Google next argues that “Plaintiffs attempted to stall by extending fact discovery.” (Mem. at 12.) Nothing could be further from the truth. Google’s argument refers to Plaintiffs’ motion to extend oral discovery (the “Motion to Extend”). (Dkt. No. 206.) That motion was well-founded, and the reasons for requesting an extension all had to do with Google’s failure to produce relevant financial documents and fulfill its discovery obligations. Those failures are described in detail in Plaintiffs’ supplemental memorandum in support of that motion. (Dkt. No. 224.) Although the Court’s Minute Order (Dkt. No. 236) reflects that the Motion to Extend

²⁵ See Transcript of Proceedings dated Sept. 30, 2010, at 7. (Dkt. No. 297.)

was “denied,” the Court did not conclude that Plaintiffs were wrong about Google’s failure to produce financial documents. Rather, the Court ruled that Google’s incomplete discovery responses related to Plaintiffs’ alleged damages and, accordingly, such discovery could be completed after summary judgment if the motion was not dispositive of Plaintiffs’ claims.²⁶

K. Plaintiffs’ Effort To Postpone Depositions Was Warranted By The Circumstances

Google complains about Plaintiffs’ counsel’s attempt “to cancel Mr. Specht’s deposition” (Mem. at 13), but Plaintiffs sought to postpone all scheduled depositions based on counsel’s good faith belief that it was the most efficient way to proceed in light of Plaintiffs’ pending request for leave to add four new defendants to the litigation. Plaintiffs’ sought to suspend the depositions long enough to give the parties an opportunity to discuss discovery logistics with any new defendants. The objective was to avoid subjecting witnesses (both parties and third-parties) unnecessarily to multiple depositions. This was all explained in Plaintiffs’ brief in support of their motion for leave to file the Third Amended Complaint. (Dkt. No. 224 at 13-14.)

Although the Court granted Google’s motion to compel the depositions (Dkt. No. 219), Plaintiffs position was justified and in good faith. The Court recognized this, at least implicitly, by denying Google’s request under Rule 37(a)(2)(A) for attorney’s fees and expenses incurred in connection therewith. (See Dkt. No. 219 at 5; Dkt. No. 225.)

L. Plaintiffs Did Not Refuse To Agree To A Protective Order

Google’s contentions that Plaintiffs “refused to agree to any protective order” and “claimed that no protective order was necessary” are baseless. (Mem. at 13.) Plaintiffs never refused to agree to any protective order. (Fleming Dec. ¶ 14.) To the contrary, Plaintiffs filed a Response to Google’s Motion for Entry of a Protective Order, acknowledging that a protective

²⁶ See Transcript of Proceedings dated July 27, 2010, at 21-22. (Dkt. No. 248.)

order was appropriate but objecting to certain terms proposed by Google. (Dkt. No. 149 at 1.) Plaintiffs filed a cross-motion for the entry of a competing protective order. (Dkt. No. 150.) The pleadings that Google cites -- Dkt. Nos. 140 and 168 -- show that the Court entered the protective order Google proposed rather than Plaintiff's. They do not show that Plaintiffs "refused to agree to any protective order" or "claimed that no protective order was necessary."

M. Plaintiffs Attempted To File The Third Amended Complaint In A Timely Manner And For A Proper Purpose

Once again, Google plays fast and loose with the record. It asserts that Plaintiffs attempted to file a Third Amended Complaint ("TAC") "months after the deadline for amending the pleadings," and the "only purpose" for the filing was to delay summary judgment briefing. (Mem., 14.) Neither assertion is true. The deadline to file amended pleadings was July 15, 2010. (Dkt. No. 174.) Plaintiffs filed the TAC on July 13, 2010, two days before the deadline. (Dkt. No. 216.) After Google's counsel questioned whether Plaintiffs could file the TAC without leave, Plaintiffs filed a precautionary motion seeking leave to file the TAC (Dkt. No. 217), which also was timely filed on July 15. (Id.)

Plaintiffs filed the TAC in good faith and for a proper purpose. The principal substantive change was the addition of four new defendants -- AT&T, T-Mobile, Sprint Nextel and Verizon Wireless (the "New Defendants"). Google identified these companies in discovery as the principal wireless carriers that sold Android mobile devices and provided wireless service for those devices. (E.g., Dkt. No. 224 at 4-5 & Ex. B.) Google argues that Plaintiffs "had no legitimate justification" for seeking to add these defendants near the close of fact discovery. (Mem. at 15.) Yet, Plaintiffs had good reasons to do so. When the Court dismissed the First Amended Complaint without prejudice as to all corporate defendants other than Google, the Court explained that Plaintiffs' claims against the other defendants (including certain wireless

carriers) could not stand without allegations of “specific acts of infringement” attributed to each defendant. (Dkt. No. 113 at 12.)

Plaintiffs filed their Second Amended Complaint, asserting only claims against Google (Dkt. No. 134), opting to determine through discovery the nature of Google’s business relationships with the various wireless carriers that played roles in bringing Android mobile devices to market, and then make an informed decision as to whether to assert claims against other defendants. Moreover, as of the date the Second Amended Complaint was filed, Google had produced less than 2,500 pages of documents.²⁷

It was not until several months later that Google began to produce the bulk of its document production. These included 63,480 pages of ESI, with more than 31,500 pages produced in or after the last week of March.²⁸ Plaintiffs spent much of April and May reviewing and analyzing these documents. Google, however, did not produce a single signed contract with any wireless carrier, and failed to produce any accounting records of revenues Google earned from Android devices, and/or shared with carriers or manufacturers. (Fleming Dec. ¶ 15.)

Early in discovery, Plaintiffs noticed a Rule 30(b)(6) deposition of Google to obtain information concerning these key issues. Plaintiffs served a list of 30(b)(6) topics about one month after receiving the bulk of Google’s documents, and asked for the deposition to be held on May 27, 2010. Google refused to produce any 30(b)(6) witnesses in May or June, forcing Plaintiffs to wait until July -- mere days before the deadline to amend pleadings and the close of discovery. (Dkt. No. 206.) When Plaintiffs finally got Google’s corporate representatives’ depositions in early July 2010, those deponents claimed that Google derived no money from

²⁷ See Dkt. No. 224 at 3 & Ex. A.

²⁸ Id.

Android. Rather, they said that the mobile carriers supporting Android phones made money from Android, and they specifically named those carriers. (Dkt. No. 224 at 5-6 & Ex. C.) So, with only a few days left to amend, Plaintiffs decided that they needed to add the carriers identified by Google as the parties benefiting from the Android mark. This conduct was reasonable in light of Google's position.

For the foregoing reasons, Plaintiffs respectfully maintain that filing the TAC in July 2010 was justified and timely.²⁹

Finally, Google's now-familiar refrain that Plaintiffs' secret purpose for filing the TAC was to "delay" or "avoid" summary judgment in hopes of leveraging a "nuisance settlement" is totally unfounded. The fact is that Mr. Fleming never approached Google about settlement. (Fleming Dec. ¶ 16.) Google initiated settlement discussions twice. Early on in the case Google's counsel called Mr. Fleming with a settlement proposal. Plaintiffs declined the offer and made no counteroffer. (Id.) Google again initiated settlement discussion after summary judgment was granted.³⁰ Google's counsel made a settlement demand to Mr. Fleming and Mr. Murphy on January 11, 2011. Mr. Fleming did not participate in any discussions that followed because he withdrew as Plaintiffs' counsel. (Id.)

Mr. Fleming's objective was always to get to summary judgment as quickly and efficiently as possible. He had no desire to prolong or complicate that process, nor any interest in doing so. There is nothing in the record to the contrary.

²⁹ For a more complete discussion of the issue, the Court is referred to Plaintiffs' briefs in support of their motions (a) for leave to file the TAC (Dkt. No. 226); and (b) to extend the deadline to complete discovery. (Dkt. No. 224.)

³⁰ See Transcript of Proceedings dated Jan. 11, 2011, at 1-2. (Dkt. No. 322.)

IV. Plaintiffs' Mandamus Petition Was Not Meritless

Plaintiffs' *mandamus* petition was filed in good faith and well-founded. The Seventh Circuit agreed that Judge Leinenweber should have recused himself from deciding the motion for leave to amend pursuant to 28 U.S.C. § 455(a). In re Specht, 622 F.3d 697, 699-700 (7th Cir. 2010). Although the Seventh Circuit ruled this error was harmless, its acknowledgment of the grounds for the petition confirms there was a good faith basis to file it.

V. The Firm Was Not Brought Into The Case To Create Disputes And Increase Costs

Google's statement that "the entire purpose of Novak [sic] and Macey's involvement in the case was to create discovery disputes and increase Google's costs" is a false and reckless accusation. (Mem. at 21.) Google purports to justify this insult by arguing that the Firm's fee agreement with Martin Murphy provided for the Firm to take a reduced share of any recovery made as a result of an appeal. (Id.) But that is not true. Google's contention is based on its misapprehension that if Mr. Murphy's share of the contingent fee increased, the Firm's share must have correspondingly decreased. (See Murphy Dep. at 293-94.)³¹ In fact, in the event of an appeal, the fee agreement provided for both Mr. Murphy and the Firm to receive an increased share of any contingency fee. It was Plaintiffs -- not the Firm -- that would receive less in the event of a recovery after an appeal. (Fleming Dec. ¶ 17.)

³¹ The July 30, 2010 Martin Murphy deposition transcript is attached as Exhibit E to Google's Memorandum.

CONCLUSION

For all of the foregoing reasons, the Court should deny Google's Section 1927 motion for sanctions against Mr. Fleming and the Firm.

Respectfully submitted,

P. ANDREW FLEMING and
NOVACK AND MACEY LLP

By: /s/ Eric N. Macey
One of Their Attorneys

CERTIFICATE OF SERVICE

Eric N. Macey, an attorney, certifies that he caused copies of the foregoing *P. Andrew Fleming and Novack and Macey LLP's Response in Opposition to Google Inc.'s Motion for Attorney's Fees and Sanctions*, to be served by electronically filing the document with the Clerk of Court using the ECF system and electronic mail this 19th day of May, 2011.

/s/ Eric N. Macey