

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

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

**GOOGLE INC.’S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION FOR ATTORNEY’S FEES AND SANCTIONS**

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Google filed a single motion seeking (i) a finding that this is an exceptional case under 15 U.S.C. §1117 justifying an award of Google’s reasonable attorney’s fees, and (ii) sanctions against Plaintiffs’ attorneys under 28 U.S.C. §1927 due to their having unreasonably and vexatiously multiplied these proceedings (“Motion”, Dkt. No. 314). In response, Plaintiffs and their current counsel, Martin Murphy (“Murphy”), continue such conduct by needlessly filing four separate pleadings (Dkt. Nos. 332, 333, 347 and 348). Plaintiffs’ former counsel Patrick Fleming (“Fleming”) and his law firm has also filed a response (Dkt. No. 343). As instructed by the Court, Google responds to all of those filings below.¹

I. PLAINTIFFS’ MOTIONS TO STRIKE LACK MERIT

Plaintiffs and Murphy each moved to strike Google’s Motion (Dkt. Nos. 332, 333). These motions are meritless, and merely comprise more of Plaintiffs’ and Murphy’s obstructionist and vexatious tactics.

A. Google’s Request for Attorney’s Fees Under 15 U.S.C. §1117(a) is Clearly Governed by Rule 54(d)(2), Not Rule 59(e)

Plaintiffs’ first frivolous argument is that a motion for attorney’s fees under the exceptional case provision of 15 U.S.C. §1117(a) constitutes a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e), and must be analyzed under the “manifest error of law” standard applicable to Rule 59(e) (Dkt. No. 332, pp. 1-4). Plaintiffs’ only support for that argument is a thirty-year-old Seventh Circuit decision, *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652 (7th Cir. 1981), which is no longer good law on that issue.

In 1981 there was no Federal Rule which addressed the filing of a motion for attorney’s fees. *Id.* at 656. Because the law was unclear as to when a motion for attorney’s fees under

¹ On April 28, 2011 the Court granted Google leave to file a single oversize brief responding to all of the papers filed by Plaintiffs and their counsel (Dkt. No. 336).

§1117(a) must be filed, the *Hairline Creations* court held that the ten-day period for a motion to alter or amend the judgment under Rule 59(e), rather than the indefinite “reasonable time” requirement of Rule 54(d), should apply to such motions. *Id.* at 659-60. That holding was designed to ensure that the determination of a request for attorney’s fees “occur close in time to the judgment in order to prevent unnecessary relitigation.” *Id.* at 659.

Notably, the Supreme Court expressly rejected this approach a year later:

A motion for attorney’s fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e).

White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 452 (1982) (citation omitted). And again, in 1988:

[W]e think it indisputable that a claim for attorney’s fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988). Furthermore, the Seventh Circuit has expressly recognized that “*Hairline Creations* is an outlier” and questioned whether, in view of the Supreme Court’s decision in *White*, *Hairline Creations* was still good law. *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 827-28 (7th Cir. 1984). The Seventh Circuit expressly noted that it “may reexamine *Hairline* if the occasion arises.” *Exchange Nat’l Bank of Chicago v. Daniels*, 763 F.2d 286, 293-94 (7th Cir. 1985).

But the occasion never arose, because the Federal Rules of Civil Procedure were amended in 1993 to add Rule 54(d)(2), which expressly provides that “unless a statute or court order provides otherwise,” a motion for attorney’s fees must “be filed no later than 14 days after **the entry of judgment.**” (emphasis added). The Advisory Committee Notes to the new Rule 54(d)(2) stated that “[p]rompt filing affords an opportunity for the court to resolve fee disputes

shortly after trial, while the services performed are freshly in mind [and] to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.” The new Rule 54(d)(2) precisely addressed the *Hairline Creations* court’s concern that the determination of a request for attorney’s fees “occur close in time to the judgment in order to prevent unnecessary relitigation.” At least one Circuit Court came to that conclusion shortly after 1993, noting that “*Hairline* was decided by the Seventh Circuit before *Budinich* and *White* and hence has little precedential value.” *SGS-Thomson Microelectronics, Inc. v. Int’l Rectifier Corp.*, 31 F.3d 1177, 1994 WL 374529, *4 (Fed. Cir. July 14, 1994).

In light of the Supreme Court decisions in *Budinich* and *White*, and the enactment of Rule 54(d)(2) in 1993, Plaintiffs’ and Murphy’s arguments are frivolous.

B. Google’s Motion Was Filed Within 14 Days of the Entry of Judgment by the Clerk, and Therefore Was Timely Under Rule 54(d)(2)

Plaintiffs’ next frivolous argument is that Google’s Motion was untimely because the Court purportedly “entered” its judgment on February 24, 2011, even though the judgment was not entered on the docket by the Clerk until March 11, 2011.²

A judgment order is effective only when the Clerk enters it in the court’s docket, not when it is signed or filed by the Court:

² Under Fed.R.Civ.P. 58, a judgment is not effective until it is set forth on a separate document and entered on the District Court civil docket. *Am. Nat’l Bank and Trust Co. of Chicago v. Secretary of Housing and Urban Dev.*, 946 F.2d 1286, 1288 (7th Cir. 1991). While Plaintiffs claim that “the technical requirements of Rules 54 and 58 need not be met for an Order to be final and appealable” (Dkt. No. 332, p. 6), the cases cited by Plaintiffs for that proposition have nothing to do with the issue of determining the timeliness of a motion under Rule 54(d), but rather address the entirely unrelated issue of whether a court’s order disposing of less than all of the claims asserted in a case qualified as an appealable judgment under Rule 54(b), and are thus entirely inapposite to the issue before this Court.

[Plaintiff] confuses the date that the district court filed its judgment with the date that it entered judgment. The date in the lefthand column of the district court’s docket sheet provides the filing date—here September 22—whereas the bracketed date at the end of the entry provides the entry date—here September 25, as reflected by the notation “[e]ntry date 9/25/00.” [T]he entry date controls [under Rule 54(d)].

Ogborn v. United Food and Comm’l Workers Union, Local No. 881, 305 F.3d 763, 769-70 (7th Cir. 2002); *see also U.S. v. Fiorelli*, 337 F.3d 282, 287 (3rd Cir. 2003) (“Rules 58 and 79 make clear that ‘entry’ is the formal act of adding the judgment or order to the clerk’s docket and that the date of entry must be memorialized by a separate notation. Thus, although an order may be signed by the district court, received by the clerk, and entered in the docket on different days, the entry date controls.”) (citing *Ogborn*); *In re Council*, 2006 WL 2087042, *1 (E.D.Pa. July 21, 2006) (citing decisions from various courts of appeals, including *Ogborn*, for the “clear” rule that the time for post-judgment filings “begins to run not from the date an order is signed by a judge, nor from the date that an order is ‘filed,’ but, rather, from the date that an Order is ‘entered’ onto the public docket by the Clerk’s Office”).

There can be no reasonable dispute that the entry of judgment in this case occurred on March 11, 2011. The relevant entries on the Court’s docket sheet³ read as follows:

02/24/2011	310	MINUTE entry before Honorable Harry D. Leinenweber:Plaintiffs’ Motion for reconsideration is denied on all counts. Google’s oral motion to dismiss without prejudice Counts II, IV, V, VI, VII of the counterclaim is granted. The Court having previously granted Google’s Motion for summary judgment on Counts I-V of Plaintiffs’ Second Amended Complaint, and Counts I and III of Google’s counterclaim. Judgment is hereby final for purposes of appeal. Civil case terminated. Mailed notice (wp,) (Entered: 03/11/2011)
02/24/2011	311	ENTERED JUDGMENT on 2/24/2011:Mailed notice(wp,) (Entered: 03/11/2011)

³ A copy of the relevant portion of the Court’s docket sheet, obtained through the Court’s CM/ECF system, is attached as Ex. 1 hereto.

Clearly, the entry date of judgment in this case was March 11, 2011, as reflected by the notation “(Entered: 03/11/2011)” in Docket Entry No. 311.⁴ The fact that the Court filed the judgment order with the Clerk on February 24 is of no consequence. *Ogborn*, 305 F.3d at 769-70. Thus, under Local Rule 54.1, Google’s Motion was due within 14 days after March 11, 2011. Because Google filed its Motion on March 22, it was timely.

Under Plaintiffs’ frivolous argument, Google’s Motion for Attorney’s Fees would have been due before Google even received a copy of the Court’s judgment order. Google’s counsel did not receive the Court’s written judgment order until that order was entered on the docket on March 11.⁵ But Plaintiffs argue that Google was required to file its Motion within 14 days after February 24 – or by **March 10**.

This is yet another example of Plaintiffs’ and Murphy’s unreasonable and vexatious conduct. Plaintiffs and Mr. Murphy were well aware of the *Ogborn* decision prior to filing their motion to strike, since Google cited the *Ogborn* decision in its Motion for Leave to File an Oversize Brief in Support of its Motion for Attorney’s Fees (Dkt. No. 315, p. 3). Given Murphy’s penchant for digging up thirty-year-old cases which have been overruled, Murphy must have encountered *Ogborn* in his research as well. And even if he had not, he certainly was aware of it when Google cited it. Yet, this binding precedent is never once acknowledged, let alone distinguished by Plaintiffs or Murphy.

⁴ Where a federal court clerk enters a document in the docket one or more days after it was filed, the CM/ECF program automatically generates “a notation that explicitly shows the date the document was entered. This appears as a bracketed phrase, for example, ‘[Entry date 04/01/99]’ or ‘[EOD 4/1/99].”“ *Houston v. Grenier*, 174 F.3d 287, 288-89 (2nd Cir. 1999).

⁵ Copies of the e-mails generated by the Court’s CM/ECF system transmitting the minute order and judgment order reflected in Docket Entry Nos. 310 and 311, clearly showing that those orders were not sent to counsel until March 11, 2011, are attached as Ex. 2.

Plaintiffs' additional argument that Google somehow timed the filing of its Motion "to prejudice Plaintiffs' attorney [Murphy] and bury him in paperwork so that he can't concentrate on the appellate brief" (Dkt. No. 332, p. 8) is utter nonsense; it has nothing to do with timeliness under the Rules, and in any event Plaintiffs and Murphy could have simply requested additional time.

C. Murphy's Motion to Strike Google's Request for Sanctions Under 28 U.S.C. §1927, or Alternatively for an Order Requiring Google to Produce Witnesses for an Evidentiary Hearing, is Likewise Without Merit

Murphy filed a separate motion to strike Google's request for sanctions against Murphy under 28 U.S.C. §1927 (Dkt. No. 333). Once again, Murphy's motion is frivolous.

First, Murphy confuses the issues by stating the truism that §1927 does not provide a basis for sanctioning a party (Dkt. No. 333, pp. 2-3). True enough – Google seeks sanctions under §1927 against Plaintiffs' counsel, not Plaintiffs themselves.

Murphy next argues that "[i]t 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" or to "specify exactly what amount Google is claiming as 'excess costs and fees'" (Dkt. No. 333, p. 3). Murphy cites no authority for the proposition that Google is required to provide such a breakdown, and no such authority exists. Indeed, Rule 54(d)(2)(C) expressly provides that the Court "may decide issues of liability for fees before receiving submissions on the value of services." Nor is Google required to appropriate some fees to Plaintiffs while appropriating others to Plaintiffs' counsel. Google is entitled to all of its fees and costs from Plaintiffs under 15 U.S.C. §1117. And it is entitled to all of its fees and costs from Plaintiffs' counsel under 28 U.S.C. §1927. There is no reason that both Plaintiffs and their counsel cannot be responsible for the same fees -- albeit on different bases.

Murphy then devotes the remainder of his motion to attempting to impugn the conduct of Google and its counsel, as if that would somehow justify Murphy's own unreasonable and vexatious conduct. (Dkt. No. 333, pp. 3-12.) Such personal attacks have become par for the course for Plaintiffs and their counsel. As usual, Murphy cites no evidence to support his allegations; the single invoice Murphy relies upon does not illustrate any misconduct, and in any event that invoice was improperly retained by Murphy after his co-counsel represented it had been destroyed.⁶ Indeed, the Court has sanctioned Murphy for his outrageous conduct in that regard (Dkt. No. 351).⁷

Murphy's reckless and unsupported accusations of misconduct by Google and its counsel, in addition to being thoroughly irrelevant to the issue before the Court, comprise the very type of vexatious conduct which the exceptional case provision of 15 U.S.C. §1117(a) and sanctions under 28 U.S.C. §1927 are intended to prevent. *See Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 966 (7th Cir. 2010) (noting that plaintiff, in responding to motion for attorney's fees under §1117(a), "continue[d] its frivolous litigation tactics" by arguing misconduct by its adversary).

Murphy's request for an "evidentiary hearing" is also frivolous. None of the witnesses Murphy purports to call have any bearing on *Murphy's* misconduct. For example, Murphy demands that two of Google's most senior officers appear and testify at the hearing – despite the fact that they have had no involvement with this lawsuit or the underlying conduct at issue. It is Murphy's, not Google's or its counsel's, conduct that is at issue here. Rule 54(d)(2)(C) merely

⁶ See Google's Motion for Protective Order (Dkt. No. 337) and the Court's Order granting that motion (Dkt. No. 351).

⁷ As Google seeks an award of fees addressing the totality of Murphy's conduct throughout this entire case, Google has not separately addressed the issue of appropriate sanctions for Murphy's conduct in this instance, which the Court has already found to have lacked justification.

requires that the Court “give an opportunity for adversary submissions on the motion.” The Court has done so here by considering Plaintiffs’ and Murphy’s excessive briefing.

While Murphy cites the Supreme Court decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), for the proposition that attorney’s fees should not be awarded under §1927 “without fair notice and an opportunity for a hearing on the record,” that decision certainly does not require the Court to hold an evidentiary hearing and permit an attorney defending against a motion under §1927 to undertake a fishing expedition into purported misconduct on the part of its adversary. Murphy has not identified any evidence that is *relevant* to the issues before the Court. Murphy’s request for an Order requiring Google’s attorneys and senior officers to appear at an evidentiary hearing comprises nothing more than another vexatious tactic conceived for the purpose of causing expense and inconvenience for Google, with no legal basis whatsoever. And, this is becoming something of a habit for Murphy – he earlier attempted to drag Google’s senior officers into this lawsuit, despite their utter lack of involvement in any relevant conduct.⁸

II. THIS IS AN EXCEPTIONAL CASE UNDER 15 U.S.C. §1117(a) ENTITLING GOOGLE TO AN AWARD OF ATTORNEY’S FEES

An exceptional case finding is justified where a party’s claim was “objectively unreasonable – was a claim or defense that a rational litigant would pursue only because it would impose disproportionate costs on his opponent – in other words only because it was extortionate in character if not necessarily in provable intention.” *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 965 (7th Cir. 2010).⁹ As discussed in Google’s Motion

⁸ See Plaintiffs’ Motion for Leave to Take Certain Depositions Prior to Filing Their Second Amended Complaint (Dkt. No. 114) and the Court’s Order denying that motion (Dkt. No. 118).

⁹ Plaintiffs incorrectly represent that the *Nightingale* decision set forth a three-factor test for determining whether a plaintiff’s decision to pursue a lawsuit was so akin to an “abuse of process” so as to render the case exceptional (Plaintiffs’ Response, Dkt. No. 347, p. 6). Although the *Nightingale* decision discusses each of the factors noted by Plaintiffs, it does not

and herein, Plaintiffs' pursuit of its infringement claims against Google was clearly objectively unreasonable and "extortionate in character."

At the outset, Plaintiffs complain that Google "chose this forum for the specific purpose of imposing disproportionate costs on Specht" (Plaintiffs' Response, Dkt. No. 347, pp. 2-3, 7). Again, Plaintiffs are the poor victim. Apparently, Plaintiffs forget that it was they who sued Google -- not the other way around. They also forget that they chose the forum by filing this lawsuit in the first place, without ever contacting Google beforehand. Plaintiffs' complaint that Google did not "contact[] Specht to work out an agreement" (Id., p. 2) is particularly ridiculous - - as there was nothing to work out; Plaintiffs had no rights in any relevant marks. And even if they did have rights, Plaintiffs chose not to contact Google and instead file a lawsuit seeking relief on an order of magnitude beyond anything Plaintiffs' marks could ever be worth -- such claims naturally encourage Defendants to respond vigorously. *See FM Industries, Inc. v. Citicorp Credit Services, Inc.*, 614 F.3d 335, 340 (7th Cir. 2010) (plaintiff's "stupendous" demand for \$15 billion in damages "led defendants to generate far more paper, and endure higher legal bills, than any plausible claim would have warranted"). Moreover, Google is the only party that ever attempted to initiate a dialog regarding settlement of this case -- attempts which Plaintiffs consistently rebuffed (see Google's Motion, Dkt. No. 314, p. 16; see also Declaration of P. Andrew Fleming, Dkt. No. 344, Ex. A, at ¶ 16 ("I never approached Google about settlement. Google initiated settlement discussions twice.")).

fashion them into any sort of test requiring the Court to evaluate each of them, as Plaintiffs suggest. Rather, as noted above, the *Nightingale* decision states that a Court can find a case to be exceptional if a party's claim was "objectively unreasonable". *Id.* at 965.

A. The USPTO’s Refusal to Register Google’s ANDROID Mark Does Not Make Plaintiffs’ Decision to Sue Objectively Reasonable

Plaintiffs’ decision to file this lawsuit was not “objectively reasonable.” The USPTO denied Google’s application to register the ANDROID mark, on the basis that Google’s mark was purportedly confusingly similar with Android Data Corporation’s registered ANDROID DATA mark (Plaintiffs’ Response, Dkt. No. 347, p. 5). But the trademark examiners at the USPTO make such determinations on a limited factual record, and had to *assume* that Plaintiffs’ mark was valid. An examiner is simply not allowed to consider any evidence which calls into question the validity of an existing registration (such as evidence of abandonment). *See In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1408 (Fed. Cir. 1997) (noting that a registration is presumed valid and “it is not open to an applicant to prove abandonment of a registered mark” in an *ex parte* application proceeding) (citation omitted). Google even submitted evidence showing Plaintiffs’ abandonment of the ANDROID DATA mark to the examiner, but the examiner could not (and did not) consider that evidence (see exhibits to Plaintiffs’ Complaint, Dkt. No. 1, at pp. 41-55).

Unlike the trademark examiner, Plaintiffs (and their counsel) were fully aware that:

- * in April 2009 that they had not made any *bona fide* trademark use of the ANDROID DATA mark since at least 2003;
- * Android Data Corporation had not existed for several years, and had to be resurrected by filing years worth of belated annual reports; and
- * Plaintiffs could not show the sale of a single product or service under the asserted marks since 2003.

Indeed, Specht told Kenneth Robblee as much when Robblee expressed interest in purchasing Specht’s long-defunct corporation.¹⁰ Having learned from Robblee that he might be

¹⁰ See Transcript of Robblee Deposition, Google’s Summary Judgment Ex. 48, at Dkt. No. 257-17, pp. 97-102, 116-124.

sitting on something “golden,” Plaintiffs (with the advice and consent of counsel) sued Google despite knowing full well that Specht had not made any *bona fide* use of the asserted marks in commerce for the better part of a decade. Murphy admitted that the motivation for filing the lawsuit was for obtaining nuisance value settlements from a large number of defendants. Any objectively reasonable person (including Plaintiffs’ counsel) in Specht’s position would have understood that Specht’s five-plus years of non-use were fatal to Plaintiffs’ claims. Thus, Plaintiffs cannot demonstrate that the decision to bring this lawsuit was objectively reasonable.

B. Plaintiffs’ Decisions to Sue Nearly Fifty Defendants and Assert Inflated Damages Claims Against All of Them Were Not Objectively Reasonable

Plaintiffs’ attempt to justify their conduct in naming nearly fifty defendants and asserting counterfeiting claims against them in order to claim absurdly inflated damages likewise fails to show that those actions were objectively reasonable.¹¹ First, Plaintiffs repeat their unpersuasive argument that they were justified in suing all forty-eight members of the Open Handset Alliance (OHA) because the OHA was supposedly a partnership that “created” the ANDROID software (Plaintiffs’ Response, Dkt. No. 347, p. 8) – a claim which remains unsupported by any facts or the law. Plaintiffs don’t even bother to address the actual legal requirements for creation of a legal partnership – because to do so would be fatal to their argument.¹² Nor did Plaintiffs ever

¹¹ This Court has previously held that there was no legitimate basis for Plaintiffs’ decision to name 48 defendants or to assert allegations of counterfeiting against each and every one of them. *Specht v. Google Inc.*, 660 F.Supp.2d 858, 865-66 (N.D.Ill. 2009). This decision was later confirmed by the Seventh Circuit. *See In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (noting that this suit “began with 47 defendants too many (raising the question whether Specht chose the list of defendants to induce unwarranted payments in settlement)”).

¹² To establish a partnership, a plaintiff must show that the parties (1) joined together to carry on a trade or venture, (2) for their common benefit, (3) with each contributing property or services to the enterprise, and (4) having a community of interest in the profits. *Autotech Technology Limited Partnership v. Automationdirect.com*, 471 F.3d 745, 748 (7th Cir. 2006) (citation omitted). The burden of proving the existence of a partnership is on the person who claims such a relationship exists. *Id.*

plead the existence of a partnership or identify a single piece of evidence showing that Google entered into an agreement with any of the other 47 named defendants (much less all of them) which would give rise to a legal partnership.

As this Court noted in dismissing Plaintiffs' claims against 47 of those 48 defendants, the prerequisite for trademark infringement is use of a trademark in commerce. *Specht v. Google Inc.*, 660 F.Supp.2d 858, 863-64 (N.D.Ill. 2009). Plaintiffs did not allege any actual use of the ANDROID mark in commerce by any of the non-Google defendants in their original or First Amended Complaint. An objectively reasonable litigant would not have sued first and asked questions later – the approach taken by Plaintiffs in this case.

Likewise, Plaintiffs attempt to rewrite history by suggesting that (i) they only asserted a claim of \$2 million in statutory damages for counterfeiting against Google, and (ii) that claim was based on a purported finding by the USPTO that “Google was using an identical mark” (Plaintiffs’ Response, Dkt. No. 347, pp. 8-9). Neither of these statements are true. First, Plaintiffs’ original Complaint and First Amended Complaint both expressly requested an award of “statutory damages of \$2,000,000 *against each of the Defendants*” (see Complaint, Dkt. No. 1, p. 18; First Amended Complaint, Dkt. No. 38, p. 22) (emphasis added).¹³ Second, the trademark examiner who examined Google’s application to register the ANDROID mark *never* stated that it was “identical” to Plaintiffs’ registered ANDROID DATA mark (as the marks quite clearly are not identical). He merely found those marks to be “sufficiently similar to cause a likelihood of confusion under Trademark Action Section 2(d)” (see exhibits to Plaintiffs’ Complaint, Dkt. No. 1, at p. 34).

¹³ Indeed, it was reported in the press at the time that Plaintiffs filed this lawsuit that Plaintiffs were seeking nearly \$100 million in damages from the named defendants (See Forbes.com article, Google’s Summary Judgment Ex. 57, at Dkt. No. 257-26).

Plaintiffs' argument that their lead counsel Murphy is "a generalist and not a specialist in the area of trademark litigation" (Plaintiffs' Response, Dkt. No. 347, p. 9) does not excuse Plaintiffs' reckless pursuit of those claims. Indeed, knowing of Murphy's expertise (or purported lack thereof), Plaintiffs still decided to hire Mr. Murphy to represent them. Having chosen counsel, Plaintiffs cannot now disavow that same counsel, because it may have been a poor choice.¹⁴

C. Disparity in Size Does Not Require a Finding for Plaintiffs

While Plaintiffs note that "disparity in size will often be relevant in evaluating the legitimacy of the suit" (Plaintiffs' Response, Dkt. No. 347, p. 9, citing *Nightingale*, 626 F.3d at 964), the mere fact that there is a size disparity between Plaintiffs and Google does not require a finding that this is not an exceptional case. Using a lawsuit to improperly distort markets, as Plaintiffs attempted to do here, is the more compelling disparity. Here Plaintiffs are attempting to use their lack of assets as a shield to assert meritless claims. Plaintiffs did not bring this lawsuit to remedy some harm in the marketplace; they brought this lawsuit to *create* harm.

This lawsuit is the precise opposite of what trademark law exists to protect. It is not uncommon for individuals or small entities to file nuisance suits of questionable merit against large, successful corporations such as Google, in the hope that the defendant will make a business decision to settle up front rather than incur the costs of defending against the suit (which often are likely to total many times a plaintiff's initial demand). Plaintiffs' suit in this case was predicated on that very model – as Murphy's interview with Forbes.com made clear early on (Forbes.com article, Google's Summary Judgment Ex. 57, at Dkt. No. 257-26).

¹⁴ The Court is reminded that Mr. Murphy is Plaintiff Erich Specht's brother-in-law.

Moreover, while Plaintiffs argue that an award of attorney’s fees would be unreasonable, because of Plaintiffs’ purportedly “limited resources” (Plaintiffs’ Response, Dkt. No. 347, pp. 9-10), Google notes that Plaintiffs have offered no evidence as to the extent of their resources. In fact, Plaintiffs’ claim that their pursuit of this case has generated “\$2.5 million in unpaid attorney time and over \$175,000 in unreimbursed costs” (Plaintiffs’ Response, Dkt. No. 347, p. 7) undermines Plaintiffs’ claims of “limited resources.” *Somebody* is paying at least those costs, if not those fees. In view of Plaintiffs’ dogged pursuit of their meritless claims (to the purported tune of \$2.5 million of attorney time), Google’s request to be reimbursed for its fees incurred in defending against those claims is hardly “excessive and unreasonable.”

III. MURPHY AND FLEMING SHOULD BE SANCTIONED FOR THEIR ROLE IN UNREASONABLY AND VEXATIONOUSLY MULTIPLYING THE PROCEEDINGS

Both Murphy and Fleming have filed separate responses to Google’s Motion, arguing why they should not personally be sanctioned for their conduct in unreasonably and vexatiously multiplying these proceedings.¹⁵ While it is unnecessary and impractical for Google to address every point raised in those responses, Google responds to the most salient points below.

A. As the Architect of this Litigation, Murphy Bears Overall Responsibility for His Unreasonable and Vexatious Conduct

At the outset, Google notes that Murphy attempts to defend his conduct in this case based in large part on information (such as deposition testimony) subsequently obtained by Plaintiffs through discovery – information which was not available to him at the time of those actions.¹⁶ Such information, which was not in Murphy’s possession at the time those actions were taken, cannot provide justification for those actions after the fact.

¹⁵ See Murphy’s Response, Dkt. No. 348, and Fleming’s Response, Dkt. No. 343.

¹⁶ See, e.g., Murphy’s Response, Dkt. No. 348, at p. 4 (citing the Android, Inc. Stock Purchase Agreement, which “was produced after the FAC [First Amended Complaint] was filed”).

1. Murphy Had No Reasonable Factual Basis on Which to Name Every Member of the Open Handset Alliance (OHA) as a Defendant

As discussed in Sec. II.B, *supra*, Plaintiffs have not identified a single piece of evidence which would support a finding that Google formed a legal partnership with any of the other 47 original defendants, which would have provided Plaintiffs or Murphy with a reasonable factual basis for naming every member of the OHA as a defendant in this case. Murphy suggests that the fact that Google released a press release stating that its “Android” software was “Developed by the Open Handset Alliance” was sufficient for him to form a reasonable belief that the OHA was a legal partnership, and that he must sue every one of its members (Murphy’s Response, Dkt. No. 348, p. 1, n.1). Nonsense.

Moreover, Murphy *still* doesn’t have the facts right. He claims that “the software companies, that were part of the OHA, created the Android software” (Id., pp. 1-2). That is simply false. Google created the “Android” software.¹⁷ The fact that Google created a marketing alliance to market and promote its “Android” software does not create a legal partnership when none of the indicia of a partnership is present. Murphy’s “partnership” argument is nothing more than an after-the-fact argument concocted by Murphy to justify his decision to name in excess of fifty defendants without any reasonable basis for doing so.

2. Murphy Had No Reasonable Factual Basis on Which to Name Android, Inc. and its Former Owners as Defendants

Murphy argues that it was reasonable for him to add Android, Inc. and its four individual owners as defendants because those individuals sold the company to Google in 2005 (Murphy’s

¹⁷ See *Specht v. Google Inc.*, 2010 WL 5288154, *3 (N.D.Ill. Dec. 17, 2010) (noting that on November 12, 2007, “Google released the Android software development kit, which allowed software developers to create Android applications”). The “software companies” to which Murphy refers develop applications software for mobile devices which use Google’s “Android” software as an operating system.

Response, Dkt. No. 348, pp. 2-4). But Murphy identifies no facts showing that Android, Inc. ever used the ANDROID trademark in commerce,¹⁸ or any legal basis to conclude that the act of incorporating or selling a company under the name “Android, Inc.” could somehow give rise to liability for trademark infringement. The fact that the company’s corporate name was “Android, Inc.” does not mean that any “ANDROID” trademark existed at the time it was acquired by Google.

The real explanation for Murphy’s decision to name the individual owners of Android, Inc. as defendants is quite simple. Murphy learned that Google had paid those individuals a significant amount of money in order to acquire Android, Inc. (see Murphy’s Ex. 3, Dkt. No. 349, at pp. 2-3, noting that “the eventual purchase price was estimated at as much as \$50 million”). These individuals simply represented additional deep pockets from which Murphy hoped to extract settlement payments by threatening them with a potential liability of \$2 million in statutory damages for counterfeiting (among other baseless claims). That decision was unreasonable and vexatious, and further contributed to unduly multiplying these proceedings.

3. Murphy Had No Reasonable Basis For Seeking a TRO or Preliminary Injunction

Murphy argues that his filing of a Motion for TRO/Preliminary Injunction (Dkt. No. 6) was justified “to stop Google from promoting Android at a trade show and on its site” (Murphy’s Response, Dkt. No. 348, p. 4). However, just as in the original motion itself, Murphy ignores the fact that a required element of a motion for a TRO or preliminary injunction is a showing of *irreparable harm* to the movant. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th

¹⁸ Android, Inc. was nothing more than a startup company which never sold a single product or service or earned a dime of profit during its short life. Indeed, Murphy acknowledges that evidence produced by Google showed that Android, Inc. “had a negative net worth of \$1 million” at the time it was acquired by Google (Murphy’s Response, Dkt. No. 348, p. 2, n.5).

Cir. 1992). Indeed, that is the very purpose of preliminary injunctive relief – to maintain the status quo in order to prevent irreparable harm to a movant that cannot be compensated by money damages alone.

Murphy failed to explain then, and fails to explain now, how in May 2009 Google’s promotion of its “Android” software (which it had released 18 months earlier and had continuously distributed and promoted during that period) would somehow have irreparably harmed Plaintiffs – whose “Android Data” software had been out of the marketplace for years.

Moreover, Murphy misrepresents the nature of the relief sought by Plaintiffs’ Motion for Preliminary Injunction/TRO, as merely “to stop Google from promoting Android at a trade show and on its site” (Murphy’s Response, Dkt. No. 348, p. 4). Rather, Plaintiffs sought a broad injunction “restraining and enjoining the defendants from . . . *using any trademark, including Android*, that imitates or is confusingly similar to or in anyway similar to Plaintiff’s trademark Android Data...” (Dkt. No. 6, p. 4) (emphasis added). Plaintiffs requested a TRO and preliminary injunction precluding Google or any other company from making *any* use of the ANDROID mark whatsoever. Such a request was manifestly unreasonable and vexatious, in view of the lack of any harm (irreparable or otherwise) which Google’s use of the ANDROID mark caused to Plaintiffs.

4. Murphy Had No Reasonable Basis on Which to Seek to Depose the Co-Chairman of Google’s Board of Directors

Murphy moved early on in this case – before having taken any discovery at all – for an Order permitting Plaintiffs to take expedited depositions of, among others, the Co-Chairman of Google’s Board of Directors (and its founder) Larry Page (Dkt. No. 114).¹⁹ The law is clear that,

¹⁹ The Court denied Plaintiffs’ motion at oral hearing (Dkt. No. 118).

before seeking to depose such high-level officers of a large company, a party should seek to obtain relevant information through other means (such as through written discovery and depositions under Rule 30(b)(6)).²⁰ Murphy had no reasonable basis for attempting to depose Page before taking any discovery at all, and that motion was merely another unreasonable and vexatious tactic calculated to put pressure on Google to settle with Plaintiffs.

B. Plaintiffs' Co-Counsel Fleming Bears Primary Responsibility for Unreasonably and Vexatiously Multiplying Proceedings During Discovery

The primary purpose for Plaintiffs' hiring of Fleming and the Novack Firm was to handle discovery in this case (see Murphy's Response, Dkt. No. 348, pp. 5-6).²¹ As such, Fleming should be held responsible for Plaintiffs' unreasonable and vexatious conduct during discovery – which was extensive.

At the outset, Google does not seek sanctions against Fleming for conduct in which he was not involved, such as Murphy's actions prior to Fleming's appearance in this case or after his withdrawal. Thus, Fleming's argument regarding "events that preceded Mr. Fleming's appearance in this case" (Fleming's Response, Dkt. No. 343, pp. 4-6) is simply moot. Nor is it

²⁰ See, e.g., *Folwell v. Hernandez*, 210 F.R.D. 169 (M.D.N.C. 2002) (noting that, prior to permitting the deposition of a high level corporate executive, courts should require the party seeking the deposition to conduct a Rule 30(b)(6) deposition); *Cardenas v. Prudential Ins. Co. of America*, 2003 WL 21293757, *1 (D.Minn. May 16, 2003) (noting that "courts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means, or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case").

²¹ Plaintiffs previously refused to produce a copy of the engagement agreement between Plaintiffs, Murphy and the Novack Firm, on the basis that that agreement was somehow privileged and/or immune from discovery. In Fleming's Response, Fleming discloses that, under that agreement, the Novack Firm would receive a higher share of any recovery in the event that this case were appealed (Fleming's Response, Dkt. No. 343, p. 25). Ordinarily, such a voluntary disclosure would constitute a waiver of any privilege or immunity that may have existed with respect to the terms of that agreement, since one may not use privilege as both a sword and a shield. But rather than reopen discovery in view of this waiver, the Court should simply disregard any new revelations in Fleming's brief.

Google's responsibility to tease out, for those portions of the case where both Murphy and Fleming were counsel, whether a particular vexatious action was undertaken at the direction of Murphy or Fleming; Murphy and Fleming were both counsel of record, and both involved in signing Plaintiffs' various frivolous motions and other papers. Thus, they should be jointly and severally liable for any vexatious conduct which occurred while both of them were counsel of record.

1. Fleming's Representation of Plaintiffs Was Undertaken Based on Either an Inadequate Investigation or With Full Knowledge That Plaintiffs' Claims Were Meritless

As addressed at length in Google's prior Motion for Summary Judgment and its Motion for Attorney's Fees, any reasonable pre-filing investigation by Plaintiffs' counsel would have revealed that Plaintiffs had made no use whatsoever of their ANDROID DATA mark in commerce for over five years prior to filing this suit. Accordingly, had Fleming conducted a basic investigation of the facts prior to appearing on behalf of Plaintiffs (such as actually reviewing copies of Specht's business records showing use in commerce), he would have readily determined that Plaintiffs' claims of trademark infringement lacked any substantial merit, because Plaintiffs had abandoned all rights to the ANDROID DATA trademark years earlier.

Thus, it is reasonable for this Court to draw the conclusion that Fleming either conducted no such investigation prior to filing his appearance, or, worse yet, was aware of the lack of any *bona fide* trademark use but chose to appear on Plaintiffs' behalf anyway. Either way, the totality of Fleming's actions in prosecuting this litigation on behalf of Plaintiffs can be deemed to have been both vexatious and unreasonable. The Court need not find that Fleming had a subjective bad-faith intent; the Court may find the existence of objective bad faith based on Fleming's actions in "prosecut[ing] a claim that lack[ed] a plausible legal or factual basis." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984).

Fleming attempts to convince the Court that Plaintiffs' claims had merit, by rearguing matters that have already been determined by the Court (see Fleming's Response, Dkt. No. 343, pp. 6-9). While it is not necessary to address each of those issues in detail, one point bears particular discussion. Fleming's argument that Google did not use its ANDROID mark in commerce until "the first Android mobile device was [placed] on the market until October 2008" is a prime example of Fleming's advocacy of a meritless position. It is undisputed that Google began using the ANDROID mark in commerce by distributing its "Android" software starting in November 2007. The Court found Plaintiffs' own admissions in its pleadings to be conclusive on this point. *Specht v. Google Inc.*, 2010 WL 5288154, *14-15 (N.D.Ill. Dec. 17, 2010). Fleming cannot claim his position throughout this case that Google did not use the ANDROID mark in commerce until nearly a year later was objectively reasonable – when his own pleadings said otherwise.

2. Fleming's Refusal to Respond to Interrogatories and Document Requests Was Unreasonable and Vexatious

Fleming argues that "[a]ll of Plaintiffs' objections and responses [to Google's interrogatories] were made in good faith and in compliance with the Federal rules" (Fleming's Response, Dkt. No. 343, pp. 9-13). Hardly. The record demonstrates that Plaintiffs' objections and responses (or lack of responses) to Google's interrogatories – all of which were signed by Fleming or by attorneys from the Novack Firm working under his supervision – were part of a calculated plan to obfuscate Plaintiffs' lack of any *bona fide* use of the ANDROID DATA trademark in commerce after 2003, and thus were objectively unreasonable.

First, contrary to Fleming's claims, the record shows that Plaintiffs' First Supplemental Response to Google's First Set of Interrogatories was not provided in good faith. Plaintiffs' First Supplemental Response (signed by Fleming) comprised nothing more than nine pages of

untimely boilerplate objections to Google's Interrogatories (which had been served on Plaintiffs five months earlier), and did not provide even a scintilla of factual information (see Ex. C to Fleming's Appendix, Dkt. No. 344). Further, Plaintiffs' boilerplate recitations that such information could be "determined by examining, auditing, compiling, abstracting, or summarizing Plaintiffs' business records" do not even remotely approach a proper response under Rule 33(d),²² and cannot possibly be deemed a good faith response in view of Fleming's admission that Plaintiffs "were still in the process of reviewing over ten years of ESI" at that point and *had not yet produced any of it* (Fleming's Response, Dkt. No. 343, p. 10, emphasis added). Plaintiffs' First Supplemental Response did not provide a single complete or useful response to any of Google's Interrogatories, and cannot be deemed anything but an unreasonable attempt to obstruct and multiply the proceedings, which required not one but two Court orders (Dkt. Nos. 148, 161) to rectify.

Second, Fleming's actions in regard to two additional motions to compel discovery filed by Google further demonstrates Fleming's penchant (displayed on numerous occasions) for

²² Pursuant to Rule 33(d), a party who relies on business records in responding to an interrogatory must specify the records "in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." *Transcap Assoc., Inc. v. Euler Hermes American Credit Indemnity Co.*, 2009 WL 1543857, *3 (N.D.Ill. June 3, 2009). Simply referring the requesting party to unspecified documents for the answers to interrogatories is "an abuse of the [Rule 33(d)] option". See *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351, 366 (N.D.Ill. 2005). In addition, a party invoking Rule 33(d) has the obligation of showing that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Simply reciting the language of the Rule does not meet that burden. See *Ropak Corp. v. Plastics, Inc.*, 2006 WL 1005406, *5 (N.D.Ill. Apr. 17, 2006) (simply stating that other parties "can determine the answers themselves by reviewing the documents" is insufficient to meet that burden). Even after being ordered to provide proper responses to Google's Interrogatories, Plaintiffs continued to take the meritless position that Google should be required to "go fish" among the many thousands of pages of discovery produced by Plaintiffs in order to obtain the requested information regarding Plaintiffs' sales (Fleming's Response, Dkt. No. 343, pp. 10-11). Such flagrant abuse of Rule 33(d) is certainly unreasonable and vexatious.

refusing to cooperate in resolving routine discovery matters. First, Fleming suggests that the Court somehow vindicated Plaintiffs in association with Google's motion to compel Plaintiffs to identify witnesses they intended to call at trial – which is simply not the case. As noted in Google's motion to compel (Dkt. No. 186), Google filed that motion because, despite the fact that Plaintiffs had supplemented their responses to Google's Interrogatories on three separate occasions, Plaintiffs had refused to provide *any* response to an interrogatory requesting them to identify witnesses that they intended to call at trial (Id., p. 2). A reasonable and good faith response to such an interrogatory would have been for Fleming to identify witnesses known to Plaintiffs at the time, while reserving the right to supplement that list should other relevant witnesses be identified. That is not what Fleming did. Rather, Fleming attempted to hide the ball, requiring Google to file yet another motion to compel to request information that he should have readily provided.

Fleming's conduct leading to Google's third motion to compel (Dkt. No. 199) further demonstrates his vexatious and unreasonable tactics. Google posed a simple interrogatory requesting that Plaintiffs identify all instances of which they were aware where any person was confused into believing that Google's and Plaintiffs' respective products were somehow related (Id., p. 2) – a standard interrogatory in a trademark infringement case. Rather than simply admit that Plaintiffs were not aware of any instances of actual confusion, Fleming asserted a laundry list of frivolous objections, which were then regurgitated in a supplemental response (Id.). Fleming now reiterates the meritless objection that answering that interrogatory about facts within Plaintiffs' knowledge somehow required expert discovery, and then concludes that because the Court granted Google's motion to compel, *but did not award fees*, Plaintiffs' position was justified (Fleming's Response, Dkt. No. 343, pp. 12-13). Moreover, Fleming

ignores entirely the fact that Google's motion also addressed Plaintiffs' unjustified refusal to produce responsive communications between Plaintiffs and third parties relating to this lawsuit (Dkt. No. 199, pp. 4-7) – a point on which the Court likewise ruled in Google's favor.

3. Fleming's Pursuit of Third-Party Discovery Was Unreasonable and Vexatious

Fleming next plays fast and loose with the facts in an attempt to justify Plaintiffs' untimely pursuit of written discovery from third parties (Fleming's Response, Dkt. No. 343, p. 18). Specifically, Fleming claims that "the parties discussed a proposed discovery schedule that called for 'written discovery' to close at the end of March 2010 [and] the Court did not adopt the proposed schedule or set a deadline for written discovery" (Id.). While the Court's order did not specify that written discovery would close at the end of March, that was only because Fleming confirmed in open court that the parties were "on the same page" that written discovery would close at "the end of March" (see Transcript from February 23, 2010 hearing, Dkt. No. 242, 12:6-14, attached as Ex. 3). While Fleming now claims to have understood that date as relating only to "written discovery between the parties," Fleming did not bother to share his "understanding" with either Google or the Court before proceeding to issue numerous third-party discovery subpoenas after that date.

Further, Fleming now attempts to justify his pursuit of subpoenas to a number of third party wireless carriers concerning sales of mobile devices under unrelated third party marks on the basis that such information "could be relevant to determining a reasonable royalty in this case" (Fleming's Response, Dkt. No. 343, pp. 15-17). Fleming does not explain how (or cite any authority in support of his position that) sales of phones by third parties under different trademarks could be relevant to the issue of damages in this case. In any event, Fleming concedes that Plaintiffs ultimately abandoned any further pursuit of the requested information

from those parties – thereby undermining their position that such information was relevant in the first place.

4. Fleming’s Reliance on Documents That Were Not Produced Timely or Never Produced at All Was Unreasonable and Vexatious

As detailed in Google’s Motion to Exclude, Plaintiffs produced several thousand pages of documents during the last week of fact discovery (and after Mr. Specht’s deposition), much of which could (and should) have been produced sooner (Dkt. No. 262). Fleming concedes that Plaintiffs improperly relied on such information in their response to Google’s Motion for Summary Judgment, and failed to comply with the Court’s order requiring them to identify and discuss those materials in a severable section of their brief (Fleming’s Response, Dkt. No. 343, pp. 19-20).

Incredibly, Fleming then takes the Court to task for excluding certain exhibits relied on by Plaintiffs (printouts from the “Internet Archive” website at www.archive.org), on the basis that those exhibits “were not part of the supplemental document production” (Id., p. 20, emphasis in original). Fleming is right – not only were those documents not part of the supplemental document production in question, they were not part of *any* document production by Plaintiffs in this case.²³ Thus, not only did Fleming not follow the Court’s instructions concerning late-produced documents, he now criticizes the Court for confusing Plaintiffs’ late-produced documents with Plaintiffs’ non-produced documents. Either way, such conduct is unreasonable and not in good faith.

²³ As noted in Google’s Reply in Support of Motion to Exclude (Dkt. No. 284), Plaintiffs never produced copies of the Internet Archive evidence on which they attempted to rely at summary judgment (Id. at pp. 3-4). Indeed, those screen shots were printed in October 2010—months *after* the close of discovery (see Google’s Reply in Support of LR56.1 Statement of Facts, Dkt. No. 289, at pp. 6, 20-23).

5. Fleming’s Failure to Negotiate a Protective Order in Good Faith Was Unreasonable and Vexatious

After the parties had attempted to negotiate a protective order, and Google had sent Plaintiffs a draft order, Fleming advised Google in November 2009 that “we do not believe that any protective order is warranted here,”²⁴ requiring Google to bring a motion before this Court for entry of an appropriate Protective Order. Fleming now shamelessly criticizes Google for stating that Plaintiffs “claimed that no protective order was necessary” (Fleming’s Response, Dkt. No. 343, p. 21). Fleming’s own words demonstrate that Google’s characterization was accurate.

6. Fleming’s Untimely Attempt to Add New Defendants Was Unreasonable and Vexatious

While Fleming argues that Plaintiffs’ attempt to file a Third Amended Complaint adding four new defendants on the eve of the close of discovery was timely, it is Fleming (not Google) who “plays fast and loose with the record” (Fleming’s Response, Dkt. No. 343, p. 22). While the Court did set July 15, 2010 as the deadline for amending the pleadings, the Court made abundantly clear on the record that the July 15 deadline did *not* apply to the addition of new parties to the case:

MR. FLEMING: [O]bviously we are entitled to have an opportunity to review the discovery, to determine whether additional parties should be joined, and so we have proposed what we think is a reasonable timeframe for that, which is July 15th.

* * * * *

THE COURT: As far as bringing in new parties it seems to me that there is not much of a problem to amend the pleadings, but to bring in new parties, it seems to be after a number of parties were in and then removed, that that is – you know. So, I will allow you to amend the pleadings up to July 15th, but not to join new parties.

²⁴ See Ex. 2 to Google’s Motion for Entry of Protective Order, Dkt. No. 140.

* * * *

MR. FLEMING: Well, what is the deadline for joining new parties, if at all? Presumably that is governed by the Statute of Limitations, Judge, so I am not even sure if it is necessary for the Court to set a deadline as to this.

THE COURT: If that is the case, then I am not ruling on that. If that is the case – and I have allowed you to amend the complaint, ***but I am not authorizing you at this point to add any new parties.***

MR. FLEMING: That is fine, Judge.

THE COURT: You can file a motion to add new parties if you want though.²⁵

The Court never authorized Plaintiffs to add new parties in July 2010. Fleming now argues that he was permitted to do so by the very Court order which stated he was ***not*** permitted to do so.²⁶ Fleming’s argument is, and always has been, frivolous.

Further, Fleming’s claim that he did not learn which wireless carriers utilized Google’s “Android” software until that information was obtained through depositions of Google’s witnesses is disingenuous, and was rejected by both this Court and the Seventh Circuit. As the Seventh Circuit noted:

It is not as if Specht learned only through discovery that AT&T, Sprint, T-Mobile and Verizon sell phones that use the Android operating system; this information is widely advertised. The wireless providers could have been named as parties from the outset.

²⁵ Transcript from February 23, 2010 Hearing, Dkt. No. 242, at 13:17 – 15:11 (attached as Ex. 3) (emphasis added).

²⁶ Fleming continues to “play fast and loose with the record” by attempting to justify his untimely filing on the purported basis that “Google refused to produce any 30(b)(6) witnesses in May or June” (Fleming’s Response, Dkt. No. 343, p. 23) – a statement which is simply false. As set forth in Google’s response to Plaintiffs’ motion to extend the close of discovery and the exhibits thereto (Dkt. No. 210), Google offered to make Andy Rubin (Google’s principal 30(b)(6) witness) available for deposition on June 2—a date which Fleming turned down for no apparent reason, notwithstanding the fact that Google had advised Fleming of Mr. Rubin’s extremely limited availability during June.

In re Specht, 622 F.3d 697, 700 (7th Cir. 2010). Moreover, Google had noted months before in its responses to Plaintiffs’ interrogatories that it derived no revenue from the sale of the Android software,²⁷ so that fact could hardly have come as a surprise to Plaintiffs, as they now suggest. Thus, despite Fleming’s best efforts at spin, no reasonable observer could conclude that Plaintiffs’ attempt to add additional defendants just before the close of discovery was justified. *See id.* (noting that it would “be an abuse of discretion” to grant Plaintiffs’ request for leave to file a Third Amended Complaint adding new parties).

IV. CONCLUSION

For the reasons set forth in Google’s Motion for Attorney’s Fees and herein, Google respectfully requests that this Court enter an Order (i) finding that this is an “exceptional case” under 15 U.S.C. §1117(a) and awarding Google its reasonable attorney’s fees, in an amount to be determined by the Court in its discretion, after Google’s submission of evidence documenting its attorney’s fees incurred to date, and (ii) entering appropriate sanctions against Plaintiffs’ counsel Martin Murphy and Andrew Fleming for their conduct in unreasonably and vexatiously multiplying these proceedings.

Respectfully submitted,

Dated: June 2, 2011

/s Herbert H. Finn
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²⁷ See Google’s Responses to Plaintiffs’ Second Set of Interrogatories at p. 3 (attached as Ex. 4).

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing GOOGLE INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR ATTORNEY'S FEES AND SANCTIONS with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: June 2, 2011

/s Herbert H. Finn _____