

**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.)	Civil Action No. 09-CV-2572
)	
GOOGLE INC.,)	Judge Harry D. Leinenweber
)	
Defendant-Counterplaintiff.)	

**P. ANDREW FLEMING AND NOVACK AND MACEY LLP’S MOTION
FOR LEAVE TO FILE *INSTANTER* A SHORT SUR-REPLY IN OPPOSITION
TO GOOGLE INC.’S MOTION FOR ATTORNEY’S FEES AND SANCTIONS**

P. Andrew Fleming (“Fleming”) and Novack and Macey LLP (the “Firm”) respectfully move this Court for leave to file *instanter* a short Sur-reply to Google Inc.’s (“Google”) Reply Memorandum in Support of Its Motion for Attorney’s Fees and Sanctions (“Reply”; Dkt. No. 352).¹ In support thereof, Fleming and the Firm state as follows:

1. On March 22, 2011, Google filed a Motion for Attorney’s Fees and Sanctions (“Motion”) and Memorandum in Support (“Sanctions Memo”; Dkt. No. 314), requesting the Court to, among other things, impose sanctions on Fleming and the Firm pursuant to 28 U.S.C. § 1927.
2. Fleming and the Firm filed their Response in Opposition to Google’s Motion on May 19, 2011 (“Response”; Dkt. No. 343), and Google filed its Reply on June 2, 2011 (Dkt. No. 352).
3. In the Response, Fleming and the Firm demonstrated -- citing supporting authority -- that Section 1927 sanctions may only be imposed on individual attorneys, not on a law firm.

¹ A copy of the proposed Sur-reply is attached hereto as Exhibit A.

Consequently, Google used its Reply to redirect its arguments specifically toward Fleming individually, rather than generally against the Firm, and included factual and legal arguments never raised before.

4. Fleming and the Firm also argued in the Response that Google's Sanctions Memo did not articulate specifically what Fleming did that multiplied the proceedings unreasonably and vexatiously under Section 1927. As such, in an effort to redirect and bolster its arguments toward Fleming individually, rather than generally against Fleming, Murphy or other attorneys for Plaintiffs, Google included factual and legal arguments in its Reply never raised before.

5. In particular, Google's Reply improperly raises two legal theories not raised in its Sanctions Memo or the Response thereto: (a) Fleming should be held jointly and severally liable for sanctions based on attorney Murphy's purported misconduct; and (b) Fleming should be sanctioned for his purported failure to supervise other attorneys. (Reply pp. 19-20.)

6. Because Google raised these arguments for the first time in its Reply, Fleming has not had an opportunity to respond thereto. What is more, both arguments are contrary to recent Seventh Circuit law. See FM Indus., Inc. v. Citicorp Credit Servs., Inc., 614 F.3d 335, 340-41 (7th Cir. 2010).

7. In addition to Google's newly-asserted legal arguments, Google also makes several purported factual assertions for the first time in its Reply, including arguments concerning: (a) Plaintiffs' fee agreement; (b) certain alleged "admissions" in the pleadings; (c) counsel's correspondence concerning the protective order; and (d) deposition scheduling.

8. For these reasons, Fleming and the Firm respectfully request leave of the Court to file a short Sur-reply *instanter*, which addresses Google's factual and legal arguments raised for the first time in its Reply.

WHEREFORE, Fleming and the Firm respectfully request that this Court:

- A. Grant P. Andrew Fleming and Novack And Macey LLP's Motion for Leave to File *Instantly* a Short Sur-reply in Opposition to Google Inc.'s Motion for Attorney's Fees and Sanctions; and
- B. Grant Fleming and the Firm any other and further relief as is appropriate.

Respectfully submitted,

P. ANDREW FLEMING and
NOVACK AND MACEY LLP

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

Eric N. Macey
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, IL 60606
(312) 419-6900
Doc#438261v2

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 Motion for Leave to File Instantly a Short Sur-reply 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 17th day of June, 2011.

/s/ Eric N. Macey