

Now, in an effort to redirect and bolster its arguments toward Fleming individually, rather than generally against the Firm or Murphy, Google includes factual and legal arguments in its Reply that it never raised before. This Sur-reply addresses these new arguments.

I. NEWLY ASSERTED LEGAL THEORIES

The Reply makes two legal arguments for the first time: (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.) Both arguments are contrary to a recent Seventh Circuit decision. In FM Indus., Inc. v. Citicorp Credit Servs., Inc., the Seventh Circuit held that “[I]iability under § 1927 is direct, not vicarious.” 614 F.3d 335, 340 (7th Cir. 2010). In that case, plaintiff had at least two attorneys who filed appearances: lead counsel and copyright counsel. The district court imposed monetary sanctions pursuant to Section 1927 and held both attorneys jointly and severally liable. Id. at 338. The Seventh Circuit reversed, stating that “personal responsibility remains essential to an award of sanctions under § 1927.” The court explained further:

At oral argument defendants contended that [copyright counsel] could be held liable because he did not prevent [lead counsel] from filing unreasonable and vexatious documents. Well, [copyright counsel] was not hired to do that, and no lawyer undertakes such a role for free. Section 1927 does not require every lawyer who files an appearance to review and vet every paper filed by every other lawyer. *Neither the text of § 1927, nor any decision of which we are aware, imposes on any lawyer a duty to supervise or correct another lawyer’s work.*

Id. at 340-41 (emphasis added). Thus, Google’s newly asserted arguments that: (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, are not only untimely, but clearly contrary to Seventh Circuit precedent.

II. NEWLY ASSERTED PURPORTED FACTS

The Response observed that the Sanctions Memo was remarkably “short on specifics” and made no effort to identify particular conduct attributable to Fleming that multiplied these proceedings unreasonably and vexatiously. (Resp. p. 4.) The Response even anticipated that Google would try to use its Reply to remedy its failure to cite specific acts of Fleming and thereby deny him any opportunity to respond. (Id. n.2.) But the Reply does just that. Where the Sanctions Memo contained only two paragraphs of vague accusations concerning Fleming (SM pp. 20-21), Google’s Reply devotes nine pages to Fleming alone. (Reply pp. 18-27.) The sincerity of these arguments is questionable given Google’s failure to assert them in its Sanctions Memo. Moreover, Fleming and the Firm have not had an opportunity to address these new factual arguments. Each is discussed below.

A. Google’s Fee Agreement Argument

The Response set the record straight that Plaintiffs’ fee agreement entitled the Firm to receive an increased share in the event of a recovery after an appeal. (Resp. p. 25, Ex. A ¶ 17.) The Reply asks the Court to disregard this fact -- and, presumably, accept Google’s description of an agreement it never saw -- because “Plaintiffs previously refused to produce a copy of the engagement agreement . . . on the basis that that agreement was somehow privileged and/or immune from discovery.” (Reply p. 18 n.21.) But Plaintiffs did not “refuse to produce” the fee agreement on grounds of privilege. The agreement was never produced or listed on any privilege log in this case because it is irrelevant.¹ Anyway, this is beside the point. Even if the document

¹ At Murphy’s first deposition, the parties disputed whether Google was entitled to ask about Murphy’s share of any recovery under the fee agreement, purportedly to show Murphy’s “bias.” Ruling on Google’s motion to compel, the Court concluded that this information was not privileged and that Google was entitled to ask Murphy about his potential recovery under the agreement. June 25, 2010 Memorandum Opinion and Order, at 15. (Dkt. No. 215.)

were withheld on privilege grounds, this would not give Google a license to make incorrect assumptions about its contents and use them to demean Fleming's motives.²

B. Google's "Use In Commerce" Argument

Google asks the Court to take special note of "Fleming's" argument that Google did not use the ANDROID mark in commerce until at least October 2008, which Google calls "a prime example of Fleming's advocacy of a meritless position." (Reply p. 20.) Google justifies this attack by arguing that "the Court found Plaintiffs' own admissions in its pleadings to be conclusive" that "Google began using the ANDROID mark in commerce in November 2007." (Id.) This is wrong. The Court found Plaintiffs admitted to Google's use of the mark in November 2007. Specht v. Google, Inc., No. 09 CV 2572, 2010 WL 5288154, at *14-15 (N.D. Ill. Dec. 17, 2010). Plaintiffs' argument concerned a different issue -- that is, whether Google's use in November 2007 was a bona fide use in commerce. As the Court's summary judgment opinion makes clear, that issue was, and is, disputed. See id. ("The issue is whether this was a bona fide use in commerce of the ANDROID mark."). Accordingly, there is no basis for Google's complaint about Fleming's "advocacy of a meritless position."

C. Google's Protective Order Argument

Google's Sanctions Memo wrongly claimed that Plaintiffs multiplied the proceedings by refusing to agree to any protective order. (SM p. 13.) Plaintiffs did not refuse to agree to a protective order; they just disagreed with the particular terms proposed by Google. (Resp. pp. 21-22.) The Reply resorts to name-calling, complaining that Fleming's criticism is "shameless" in light of an email in which he stated that "we do not believe that any protective order

² Although the Firm doubts that the Court is interested in the substance of the fee agreement, if the Court has any questions that have not been answered by the parties' submissions, the Firm will be happy to submit the agreement for *in camera* review.

is warranted.” (Reply p. 25.) But this misses the point completely. Plaintiffs offered to compromise by agreeing to a reasonable protective order without an “attorneys’ eyes only” provision. And this is plainly set forth in the e-mail correspondence attached to the very same motion that Google cites in the Reply.³ This is reasonable conduct, and obviously not cause for sanctions under Section 1927.

D. Google’s “Fast And Loose” Arguments

The Reply twice accuses Fleming of “playing fast and loose with the record.” Both accusations are unwarranted. First, it suggests that Fleming cannot reasonably believe that Plaintiffs’ attempt to file a Third Amended Complaint in July 2010 was timely, because the Court stated five months earlier: “I am not authorizing you at this point to add any new parties.” (Reply pp. 25-26 (quoting Feb. 23, 2010 hearing transcript).) Yet, the Court immediately followed that statement by saying, “You can file a motion to add new parties if you want though.” (Id.; emphasis added.) Although the Minute Order from the February 23 hearing was silent on the addition of new parties, Plaintiffs moved for leave to file the Third Amended Complaint on July 15, which was the deadline to amend pleadings according to the February 23 order.

Second, Google takes exception to the Response’s statement that “Google refused to produce any 30(b)(6) witness in May or June.” (Reply p. 26 n.26.) However, as shown by counsel’s June 3, 2010 e-mail correspondence, this is true.⁴ Google refused to offer any dates in May or June for the 30(b)(6) deposition, so it could not be completed until July. Although Google argues that it offered one day in June for the Rubin deposition, Rubin had not been identified as a

³ See, e.g., Google’s Motion for Entry of Protective Order, at Exs. 4, 11. (Dkt. No. 140.)

⁴ See Plaintiff’s Motion for Extension of Time to Complete Oral Discovery, at Ex. C pp. 14-15. (Dkt. No. 206-2.)

30(b)(6) witness at that time. Only after Rubin's deposition was set for July 9 was he designated as a 30(b)(6) witness on certain issues.⁵ Counsel then agreed Rubin would be deposed individually and as a corporate representative on that same date. In all events, Plaintiffs could not complete the 30(b)(6) deposition without Google's other designated representative, who was made available only in July, just days before the discovery cutoff and pleading amendment deadline.⁶

CONCLUSION

Accordingly, for the reasons set forth in P. Andrew Fleming and Novack and Macey LLP's Response in Opposition to Google Inc.'s Motion for Attorney's Fees and Costs (Dkt. No. 343) and herein, the Court should deny Google's Motion for Attorney's Fees and Costs.

Respectfully submitted,

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⁵ See id., at Ex. B p. 9, Ex. C pp. 14-15.

⁶ See id.

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 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 22nd day of June, 2011.

/s/ Eric N. Macey