SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY COMMERCIAL PART48

PRESENT: **Andrea Masley, JSC**

CALLSOME SOLUTIONS INC.,

Plaintiff,

-against-

GOOGLE, INC.,

Defendant.

INDEX NO. **652386/2014**
MOTION SEQ. NO. **005**
MOTION CAL. NO.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In motion sequence number 005, plaintiff Callsome Solutions, Inc. (Callsome) moves for an order directing defendant Google, Inc. (Google) to review its confidentiality designations of documents and deposition transcripts, to de-designate or re-designate all document and deposition transcripts designated "Attorneys' Eyes Only" (AEO) or "Confidential," and for sanctions for Google's excessive use of the confidentiality designation. Since Google reduced its 233 AEO designations to 28 documents and 8,390 AEO lines of depositions to 632,[1] Callsome has withdrawn its objection to Google's designations. Accordingly, the only remaining issue before the court on this motion is Callsome's request for sanctions.[2]

Background

Google created and operates Google Play, a marketplace for applications (apps)

[1]At argument, Google agreed to allow Callsome's three principals access to the AEO discovery. (Tr. 20:6 to 23:23.) The parties modified their Stipulation and Order for the Production and Exchange of Confidential Information accordingly and the court so-ordered it October 18, 2018.

[2]Callsome points to Google's confidential designations of publicly available documents as evidence of Google's practice of excessive designations. For example, Google allegedly marked as confidential 3,711 of 3,954 identical warning notices it sent to app developers which have been posted on the internet. (Bronson aff at ¶ 16.) The court's review of three such notices (Bates No. Goog-Call 511, 444, and 388) supports Callsome's contention. Overuse of confidentiality designations is also sanctionable. (*See Ulico Inc. Lit*, 237 FRD 314, 317 [D DC 2006].) However, this decision focuses on the immediate consequences of AEO designations when allegedly used for an improper purpose.

that are used worldwide on smart phones and tablets. (Woodward aff at ¶ 3.) Numerous developers use Google Play to distribute their apps, with over 1 million apps available to over 1 billion active users worldwide. (*Id.* at ¶¶ 8 and 12.) Google regulates the developers to ensure that the marketplace is "the most innovative and trusted source of apps" for users. (*Id.* at ¶ 4.) Callsome allegedly violated Google's regulations.

Callsome created its Post Call Manager Software Development Kit (PCM SDK) as an add-on to third-party apps, allowing a user to "quickly call back, reply via SMS, send an email, create a calendar event, search the web, and more" after the user ends a telephone call. (Compl. ¶ 29.) In November 2013, Google sent suspension warning notices to app developers who integrated the PCM SDK into their apps for allegedly violating Google's ad policy. (Compl. ¶¶ 38, 41.) On August 4, 2014, Callsome initiated this action against Google alleging trade libel and tortious interference with Callsome's contracts with existing and prospective app developers.[3]

On November 2, 2015, Justice Oing so-ordered the parties' Stipulation and Order for the Production and Exchange of Confidential Information (the Confidentiality Agreement), which provides for two-tiers of protection: Confidential and AEO. (NYSCEF Doc. No. 35.) The parties agreed to use the "Confidential" designation for "all Discovery Material of which a Producing party takes reasonable precautions to maintain the confidentiality and that the Producing party in good faith believes qualifies for protection under" CPLR 3101. (Confidentiality Agreement 3 [a].) They agreed to use the "Highly Confidential – Attorney's Eyes Only" designation to protect confidential information that

[3] These are the remaining claims after Google's pre-answer motion to dismiss was decided April 29, 2015.

is "extremely sensitive" including information about "technical data or information," "confidential and commercially sensitive competitive information," "strategic plans" and "confidential research and development information." (*Id.* at 3 [b].) The Confidentiality Agreement restricts access to AEO designated documents to counsel for the parties. (*Id.* at 5 [b].) The Confidential and AEO designations were to be used only in good faith. (*Id.* at 4 [a].)

In May 2016, Google produced 3,923 documents consisting of 4,771 pages. (Arnold aff at ¶ 3.) Of these documents, 3,690 were designated as Confidential and 233 were designated as AEO. (*id.*) Callsome immediately objected, explaining that the AEO designations impacted Callsome's representation. (Shaw aff at ¶ 6.) The parties agreed to a process whereby Callsome would identify important documents and request Google's permission before showing the document to a Callsome principal. (*Id.*)

On February 6, 2017, Kent Bronson, Esq., replaced a colleague in representing Callsome. (NYSCEF Doc. No. 48.)

In March 2017, Callsome deposed three Google employees, Sebastian Johann Porst, Ivan Kuznetsov, and Bryan Woodward. (Bronson aff at ¶ 21.) A month later, Google issued a list of pages and lines of AEO designations for the depositions of Porst, Kuznetsov, and Woodward. (Shaw aff at ¶ 9). For example, Google marked 110 out of 138 pages (or 2,200 out of 3,450 lines) of Porst's testimony as AEO. (Bronson aff at ¶¶ 23 & 25; exhibits 17, 18, & 19.) In the summer of 2017, Callsome deposed three more Google employees, including Kana Kanakamedala. (*Id.* at ¶ 22.) Google designated 53 of 95 pages of Kanakamedala's two hour deposition as AEO, including some of his 60 "I don't know" answers. (*Id.*, exhibit 33.)

In late August, 2017, Callsome challenged the AEO designations for the

depositions of Porst, Woodward, Kuznetsov, and Kanakamedala. (*Id.*, exhibits 2, 3, 4, 5, 6, 7, & 9.) Callsome also demanded that Google review its documentary confidentiality designations. (Bronson aff, exhibit 9). Initially, Callsome challenged Google's designations with samples of objectionable designations. (*Id.*, exhibits 2 to 9.) When Google failed to take corrective action, Callsome proceeded to conduct a line-by-line review. The parties conferred about the challenged designations on August 31, 2017. (*Id.* at ¶ 6.)

Between September 22 and October 3, 2017, Google revised some of its deposition AEO designations to Confidential. (*Id.*, exhibits 26, 27, and 29; Shaw Aff at ¶ 13.) According to Callsome, Google never modified the designations for Kuznetsov's deposition testimony. Callsome reviewed the changes that were made and objected. (Bronson aff at ¶ 30 and exhibits 26 and 27). The parties met again on October 13, 2017 to discuss Google's numerous designations. (*Id.* at ¶ 31.) Google again agreed to correct designations within a week. (*Id.*).

On October 17, 2017, Google downgraded the designation of 32 documents from AEO to Confidential. (Arnold aff at ¶ 9; Bronson aff, exhibit 8.) Callsome insists that these documents should never have been designated AEO because some of the documents contained information publicly disclosed since mid-2014. (Bronson aff at ¶ 33.) Callsome provided examples of the publicly available information. (*See id.*, exhibits 44, pp 3, 22-23; exhibits 45-55). Also contained in these de-designated items were correspondences between Callsome and Google that Google had initially designated AEO. (Tr. 7:9 to 17; tr. 4:26 to 5:8.)

In an email dated October 19, 2017, Google agreed to continue to review deposition designations. (Bronson aff, exhibit 29.) However, Google explained that

since Callsome "was admittedly the cause of such enforcement efforts, it is reasonable for Google to designate certain materials such that your client would not be able to access them." (*Id.*)

On February 1, 2018, Callsome filed this motion seeking an order directing Google to de-designate its allegedly excessive designations and for costs and sanctions. (NYSCEF Doc. No. 69.) Callsome claims that it is prejudiced by Google's improper AEO designations because Callsome's counsel is barred by the Confidentiality Agreement from discussing the designated material with Callsome's principals. Further, it has incurred unreasonable expenses due to Google's repeated reviews of designations of documents and depositions forcing Callsome to review, compare and re--review each time. Indeed, Google's law firm expended "well over 100 hours" conducting re-reviews in addition to the countless hours spent by Google employees. (Arnold aff at ¶ 20.) Callsome complains that Google has purposefully created an information vacuum and power imbalance.

Google argues the motion should be denied because Callsome failed to notify Google before filing this motion in violation of the court's rules. Google also challenges the timing of this motion as it was filed after expert reports were exchanged in November 2017 and January 2018. (Shaw aff at ¶ 8.) While none of the expert reports contained Google designated AEO information, Google points to this tardiness as evidence of the impropriety of this motion. (Arnold aff at ¶ 12.)

On February 15, 2018, the parties participated in a scheduling conference with the court.[4] The court was surprised to learn that Google had designated hundreds of

[4]Since the purpose of the conference was to attempt to resolve the discovery issue or to schedule the motion for argument, a court reporter was not present. The conference occurred in the robing room to accommodate Google which participated by phone. It

documents and thousands of lines of depositions as AEO. The court reminded the parties that the AEO designation was reserved for truly secret documents and that, while the court had not reviewed the documents at that point, it was unlikely that hundreds of documents would satisfy that definition. The court suggested that the dispute could be resolved if Google allowed at least one of the Callsome principals to view the AEO designated documents. (*See* tr. at 47 [discussing 2/15/18 conference].)

On February 26, 2018, Google offered to permit all three Callsome principals to view all materials designated AEO if Callsome withdrew this motion with prejudice. (Arnold aff, exhibit 1). Google also offered not to oppose Callsome's efforts to obtain the same level of access to third-party produced materials. (*Id.*) Callsome countered by demanding that Google pay its costs and fees for this motion.

On March 6, 2018, Google made another offer before filing its opposition to Callsome's motion. Google proposed substantial revisions to both its documents and deposition designations and to allow one Callsome principal to have access to the remaining AEO materials. Specifically, the proposed revisions would reduce the number of AEO documents from 118 to 28, and reduce the number of AEO designations of deposition testimony. (*Id.*, exhibit 2.) Google's offer expired in 24 hours. (*Id.*; *see also* tr. 6:4.)

Although Callsome rejected this bargain, on March 8, 2018, Google nevertheless de-designated 118 documents from AEO to Confidential reducing the total number of AEO documents to 28. (*Id.*, exhibits 2 & 3.) Google asserted that these documents

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was not hearing. Counsel are urged to become familiar with terminology (e.g. conference, argument, hearing, trial) and geography (courtroom, robing room, chambers). Otherwise, counsel's inaccurate terminology erroneously suggests improper court proceedings.

concerned market share research and enforcement actions that Google had taken in 2013 –five years prior. (Woodward aff at ¶ 23; 25-26.)

As to the remaining 28 AEO designated documents, Google asserts these 28 documents and some deposition transcripts are properly marked AEO because they "relate to Google enforcement team wide - - system wide strategies and procedures for keeping bad content, such as malware and spam, out of apps that might be downloadable via Google Play." (Tr. 12:14 to 18.) Specifically, Google disclosed that the 28 documents include conditions in the Russian marketplace, Google's activities in Russian, and search share percentages. (*Id.* at 40:15-17.)

Google argues that Callsome's AEO challenges, not Google's AEO designations, created the problem here. Google opines that a request to add Callsome's principals to the AEO group, would have obviated the reviews, re-reviews and this motion. (*Id.* at 42:16-20). Google accuses Callsome of having an improper motive. However, Callsome denies any impropriety in making this motion and accuses Google of using its market size and significant resources to bully Callsome.

At argument, on March 23, 2018, the court granted Callsome's motion, but reserved decision on the issue of sanctions and instructed the parties to submit relevant case law discussing attorneys' fees, costs, and sanctions in the context of over-designation. As requested, Callsome submitted a letter with case citations. Google delivered a box of 233 documents originally marked AEO to show its designations were proper.

Analysis

As a preliminary matter, Google had sufficient notice before Callsome filed this motion. Callsome's repeated demands for de-designations and the parties' numerous

meetings to address this issue provided ample notice to Google that its designations were at the very least questionable and that Callsome took issue with them.

"[O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice." (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted].) Accordingly, 22 NYCRR Section 130-1.1 (a) empowers courts with discretionary authority to sanction attorneys or parties, in the form of costs and fees, for frivolous conduct. Conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or (3) it asserts material factual statements that are false." (Rule 130-1.1 [c].) To preserve the integrity of the court system, sanctions are imposed to deter future frivolous conduct and "vexatious litigation and dilatory or malicious litigation tactics." (*Levy v Carol Mgmt. Corp.*, 260 AD2d 26, 34 [1st Dept 1999].)

Various factors are considered to determine whether conduct is frivolous. First, and foremost is "the broad pattern of conduct by the offending attorneys or parties." (*Moore v Federated Dept Stores*, 2010 NY Slip Op 31899[U], *7 [Sup Ct, NY County 2010], citing *Levy*, 260 AD2d at 33.) A corollary consideration is "whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such conduct was brought to the attention of the parties or to counsel." (*Levy.*, 260 AD2d at 34.)

Google contends that Callsome has failed to establish "frivolous conduct" as defined by Rule 130-1.1 (c). According to Google, its conduct here can hardly be "frivolous" because: (1) the designations were appropriately and thoughtfully applied to

protect the confidentiality of the work of the Google Play security and policy enforcement teams; (2) Google has repeatedly accommodated Callsome's demands for de-designations and its good faith efforts should not be construed as an admission of misconduct; and (3) a contrary finding would have a chilling effect on future offers to compromise.

AEO designations "shall be made as sparingly as possible" since they have severe consequences affecting the adversary's investigation, attorney client communications, the search for truth, and the judicial system, which is inevitably drawn into the discovery process. (*Fendi Adele S.R.L. v Burlington Coat Factory Warehouse Corp.*, 2006 US Dist LEXIS 89546, *6 [SD NY 2006].)

The court is hard pressed to see how Google's voluminous AEO designations were appropriately applied. The large number of designations, reviews, re-reviews, trickle of de-designations, culminating in a wholesale de-designation on the eve of argument of this motion does not support Google's assertion of appropriateness. (*See Broadspring, Inc. v Congoo, LLC*, 2014 WL 4100615, *22, 2014 US Dist LEXIS 116070, *64 [SDNY 2014] [sanctioning counsel for its pattern of blanket designations, re-designations, and re-production of the same documents on nine separate occasions within a three-month span]; *see also Humphreys v Regents of the Univ. of Cal.*, 2006 WL 3020902, *3, 2006 US Dist LEXIS 79044, *8 [ND Cal 2006] [sanctioning counsel where more than 25 percent of previously designated documents and all computer data were de-designated at a meet and confer held after the filing of defendants' motion to maintain its earlier confidentiality designations].) Further, Google's admitted use of AEO designations to punish Callsome for causing the enforcement action also evidences that the AEO designations were not appropriate. While using AEO

designations as a litigation tactic certainly requires strategic thinking, it does not constitute the thoughtfulness contemplated.

While Google characterizes its de-designation of almost all of its previously designated AEO documents following the February 2018 court conference as good faith cooperation, the court sees a strategy to "maliciously injure" Callsome. (*See DelCampo v Am Corrective Counseling Servs, Inc*, 2007 WL 3306496, 2007 US Dist LEXIS 87150 [ND Cal 2007] [where de-designations not offered until after motion filed, sanctioning remains justified].) Google's wholesale de-designation confirms that Google's initial designations were not made in good faith. That Google has de-designated on at least five occasions illustrates this point. Each time, Callsome was compelled to re-review. (*See In re Ullico Inc. Litig.*, 237 FRD at 318 [awarding sanctions because of the burden imposed on counsel to "cross-check the supplemental list, in addition to searching the discovery database" to determine whether a document is confidential, despite counsel's voluntary revised designations for 4,000 documents].)

Google's actions appear to be an effort to thwart judicial scrutiny of its designations. Significantly, Google became noticeably proactive in its de-designation efforts only after the court became involved and the issue of sanctions was raised. Indeed, after the February 2018 court conference, the slow trickle of de-designated documents to Confidential quickened as Google de-designated nearly all its previously designated AEO documents. Submitting a box of 228 documents for the court's review after Callsome's effective argument for sanctions does not negate this appearance. Indeed, it exemplified Google's strategy of document dumps and allowed the court to review and confirm Callsome's allegations.

A slow trickle of corrections does not rectify initial improper designations. For

instance, "Google originally designated as AEO" 32 documents because they allegedly "contained the type of information that, as a matter of practice, Google considers highly sensitive and does not divulge publicly, particularly not to individuals who created the apps." (Woodward aff at ¶ 3.) However, the court reviewed the 32 documents Google referenced and found these documents contained correspondences sent by Callsome to Google describing certain suspension notices and the circumstances surrounding receipt of the suspension notices. (Van Tuyl, April 20, 2018 aff, exhibit D.) They also included correspondences from Google to Callsome requesting additional information about the suspended apps. (*Id.*) Not only are these documents bereft of "highly sensitive" information, but there can be no argument that divulging them to Callsome posed some sort of risk because these correspondences were drafted by or sent to Callsome.[5]

Google also originally designated AEO "36 documents that concern or otherwise reveal market share research conducted internally by Google personnel." Woodward aff at ¶ 2.) However, Google's categorization of these documents as market share research was disingenuous. The court reviewed the 36 documents and confirmed that these documents contain correspondences among Google personnel from 2013, who discuss a different app that allegedly "fuel[ed] bad behavior on Google Play." (Van Tuyl aff, exhibit B.) They have nothing to do with "market share research" -- assessment of "the percentage of the market for a product or service that a company supplies." (Merriam-Webster Collegiate Dictionary 760 [11th ed 2009]). Google's conduct demands attention if it is to be stopped. (*Gibbs* v *St. Barnabas Hosp.*, 16 NY3d 74, 81

[5] Insofar as these documents contained information protected under the attorney-client privilege, that information was redacted and is not at issue here. (Woodward aff at ¶ 3).

[2010]).

Although Google justifies its bulk de-designation as due to the passage of time, Google rejected this exact reason for de-designating when Callsome raised this months before this motion was filed. Google offers no credible explanation for what changed in that short time. (*See* Bronson reply aff., exhibit F.) Recycling Callsome's objection suggests that Google's original justification was baseless.

Additionally, Google's pattern of improper conduct continued even after the parties' February 2018 conference with the court, as its attempt to extract concessions from Callsome was improper. Google's March 6, 2018 "offer to compromise" was nothing of the sort. No public policy is served by crediting Google's purported offer of compromise, the sincerity of which is belied by the impractical nature of its deadline: 24 hours. Before it could consider Google's offer, Callsome had to cross-reference this latest batch of de-designated documents against earlier designations.

AEO designations are not negotiable. Discovery is either "extremely sensitive" technical data or commercially sensitive or strategic plans, or research and development or not. Either documents are truly secret and their disclosure will be harmful to the owner of the document or not. If not, then the discovery may be protected by a designation of confidential and the discovery remains unavailable to the public, but usable by the parties for the purposes of this litigation only. A party cannot over designate documents then hold the improperly designated documents hostage until the adversary surrenders. Such conduct will not be countenanced by this court.

Google argues that its conduct is not egregious by comparison to others who were sanctioned for "pursuing meritless claims," "withholding relevant evidence" and "deliberately violating a court order to produce evidence." (NYSCEF Doc. No. 193).

However, Google is not immunized because other parties have done worse or because there were even more documents and depositions that could have been improperly AEO designated. There were serious consequences of Google's improper designations, not only delay, but also the impact on the communications between Callsome and its attorney. (*See Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 326 [1st Dept 2006] [explaining that documents should not be designated AEO in such a manner that "prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action against them"].)

In sum, Google's conduct flouts widely accepted rules of civility embedded in New York litigation, and in particular the Commercial Division. (*See* 22 NYCRR 202.70 [g].). Google "adopted a pattern of partially complying with demands for disclosure, . . . resulting in a delay in the completion of discovery." (*United States Fire Ins. Co. v J.R. Greene, Inc.*, 272 AD2d 148, 149 [1st Dept 2000] [internal quotation marks and citations omitted].) By providing piecemeal de-designations, only when prompted, and dropping its designations, only when threatened with court review, Google effectively prevented the expeditious resolution of this litigation, as it was Google's excessive AEO designations, not Callsome's challenges of those designations, that caused the delay here. This pattern of dilatory conduct is precisely the type of "[c]hronic noncompliance [that] breeds disrespect ... [in] a culture in which cases can linger for years without resolution." (*Gibbs*, 16 NY3d at 81.)

AEO designations seek to "protect one party from injury — usually injury to the party's business — that might occur if the information is revealed to the party's competitor." (*Gerffert Co. v Dean*, 2012 WL 2054243, *5, 2012 US Dist. LEXIS 78824,

*13-14 [ED NY 2012].) If Google was concerned that Callsome might not protect Google's secrets, then it could have amended the Confidentiality Agreement to add penalties for violation of the confidentiality designation e.g. financial; over designation is not the solution. As a result, Google successfully shifted the burden of reviewing its designations to Callsome. (See *DelCampo v Brown*, 2007 WL 3306496.) To allow such improper use of the Confidentiality Agreement is to reward that behavior.

Accordingly, it is

ORDERED that motion sequence number 005 is granted for the reasons stated in this decision, as well as the reasons stated on the record on March 23, 2018; and it is further

ORDERED that Google shall pay Callsome the reasonable expenses and fees incurred in making this motion and all of the costs associated with reviewing and re-reviewing the same documents over and over again. Within 30 days, Callsome shall provide an affirmation of services explaining the amount it seeks and why. Google may submit opposition within 30 days thereafter.

Dated: October 18, 2018

ENTER:

HON. ANDREA MASLEY
J.S.C.

Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE