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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

DDC TECHNOLOGY, LLC,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 3:23-cv-01160-VC

**DDC TECHNOLOGY, LLC'S MOTION
FOR MISCELLANEOUS RELIEF
REGARDING GOOGLE LLC'S
THREATENED SANCTIONS**

REDACTED – FILED PUBLICLY

Date: Thursday, November 30, 2023

Time: 10:00 a.m.

Place: Courtroom 4, 17th Floor
San Francisco Courthouse

Judge: Hon. Vince Chhabria

NOTICE OF MOTION

PLEASE TAKE NOTICE, that on Thursday, November 30, 2023 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 4 at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, 17th Floor, before the Honorable Judge Vince Chhabria (or any Judge sitting in his stead), Plaintiff DDC Technology, LLC (“DDC”) will and hereby does move for miscellaneous relief regarding Defendant Google LLC’s (“Google”) threat of sanctions.

DDC’s Motion is based on this Notice and the accompanying Memorandum of Points and Authorities; Exhibits; and the Declaration of Timothy J. Haller filed in support.

For its relief, DDC requests an order from the Court:

(A) Finding either (i) that DDC’s undersigned NDCAL counsel have not engaged in any improper or sanctionable conduct, before this Court or otherwise; or (ii) that this Court does not have authority to consider Google’s sanctions threats regarding the allegedly offending conduct (as Google’s accusations are directed to activity in the PTAB and Texas fora);

(B) Finding that Google’s threats to seek sanctions in this Court were improper (given that the allegedly offending conduct occurred at the *PTAB* and involved an alleged breach of a *Texas* contract and *Texas* statutes, pursuant to mediation in *Texas*); and

(C) Admonishing Google for its threats to seek sanctions and providing any relief the Court deems appropriate and just.¹

¹ While DDC’s motion does not affirmatively seek sanctions against Google, this motion necessarily involves the issue of sanctions in view of Google’s threats. Accordingly, this motion is prepared in compliance with Civil L.R. 7-8.

Dated: October 26, 2023

/s/ Timothy J. Haller

HALLER LAW PLLC

Timothy J. Haller (*Pro Hac Vice*)

***Attorney for Plaintiff,
DDC Technology, LLC***

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff DDC Technology, LLC (“DDC”) hereby files this motion for miscellaneous relief regarding the threat of sanctions by Defendant Google LLC (“Google”).

I. STATEMENT OF THE ISSUES TO BE DECIDED

Whether this Court is an appropriate forum for Google’s threat of sanctions; and

Whether Google’s threat of sanctions was proper.

II. RELEVANT FACTUAL BACKGROUND REGARDING GOOGLE’S THREATENED SANCTIONS

On July 28, 2023 and August 23, 2023, in the parallel Patent Trial and Appeal Board (“PTAB”) proceedings initiated by Google, DDC filed *under seal* its Patent Owner Preliminary Responses (“POPRs”) to Google’s *inter partes* review petitions (“IPRs”). (Haller Decl. ¶¶ 5-6, Ex. A-1 and Ex. A-2², representative POPR in IPR2023-00707 for the ‘075 Patent).

On September 5, 2023, Google’s NDCAL counsel sent a letter to DDC’s NDCAL and PTAB counsel, wherein Google accused DDC of improper conduct with respect to DDC’s recitation of certain salient facts in its POPRs regarding Google’s relationship with a third party. (Haller Decl. ¶ 7, Ex. B). Specifically, Google alleged that DDC’s POPRs breached a Mediation Agreement in the Northern District of *Texas*, violated *Texas* state statutes, and ran afoul of Federal Rule of Evidence 408. Rather than seeking to resolve the matter through litigation in *Texas* or at

² The Haller Declaration Exhibits are being provisionally filed under seal contemporaneously herewith. While DDC’s administrative motion to consider whether material should be sealed supports the sealing of certain information of third parties, DDC does not believe it can support filing under seal of other information that Google apparently contends should be withheld from the public and/or *this Court*. Specifically, DDC disputes that *any* information/argument should be withheld from this Court and further disputes that Google’s letters threatening sanctions should be withheld from the public based on a “Highly Confidential” designation. DDC’s specific positions are set forth in its accompanying administrative motion and DDC proposes that Google promptly show good cause with respect to any information not supported by DDC’s accompanying motion.

the *PTAB* (through Google's separate *PTAB* counsel), Google's *NDCAL* counsel threatened DDC's *NDCAL* counsel with sanctions *in this Court*:

[REDACTED]

(Haller Decl. ¶ 7, Ex. B, p. 3). DDC promptly responded to Google's letter on September 8th, stating:

[REDACTED]

(Haller Decl. ¶ 8, Ex. C, p. 6). On September 18th, Google's *NDCAL* counsel replied:

[REDACTED]

(Haller Decl. ¶ 9, Ex. D, pp. 1 and 3). DDC responded on October 17th:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Haller Decl. ¶ 10, Ex. E, pp. 2, 4-5, 6). On October 25th, Google responded in pertinent part:

[REDACTED]

(Haller Decl. ¶ 11, Ex. F, pp. 1-2).

III. LEGAL STANDARD FOR SANCTIONS

As Google has recited: “District judges have an arsenal of sanctions they can impose for unethical behavior ... includ[ing] monetary sanctions, contempt, and the disqualification of counsel,” (see Haller Decl., Ex. B, p. 3, quoting *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996)); “a district court has the primary responsibility for controlling the conduct of the attorneys who practice before it”; and, “[w]henever an allegation is made that an attorney has violated his moral and ethical responsibility,” it is the “duty [of the district court] to examine the charge of unethical behavior and impose the necessary sanctions.” (See Haller Decl. ¶¶ 7 and 9, Ex. B, p. 3 and Ex. D, p. 3; quoting *Erickson*, 87 F.3d at 303-04).

The decision to grant sanctions is within the court’s sound discretion. See *Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996); *Wages v. Internal Revenue Service*, 915 F.2d 1230, 1235 (9th Cir.), *cert. denied*, 498 U.S. 1096 (1991); *Erickson*, 87 F.3d at 303. Sanctions are warranted in cases where “[t]he totality of the sanctioned conduct visits an unendurable burden on the justice system in the name of misguided advocacy.” *Moser v. Bret Harte Union High Sch. Dist.*, 366 F. Supp. 2d 944, 988 (E.D. Cal. 2005) (imposing sanctions on conduct “implicat[ing] unacceptable written advocacy and obstruction which violate[] rules of court and professional conduct, forcing an opposing party and the court to spend inordinate time addressing such issues” in pleadings, briefings, and written orders). However, “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers*, 501 U.S. at 44 (citations

omitted). Courts may not invoke these powers without a “specific finding of bad faith.” *U.S. v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986) (citation omitted).

Courts have the inherent power to disqualify counsel because of an ethical violation. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100, 1103 (N.D. Cal. 2003). However, disqualification is a drastic measure that is disfavored. *Id.* at 1104. “Because of this potential for abuse, disqualification motions should be subjected to particularly strict judicial scrutiny.” *Optyl Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (citation omitted). Depending on the circumstances, courts should also consider “the possibility that tactical abuse underlies the [] motion.” *People ex rel. Dep’t of Corps. v. Speedee Oil Change Sys., Inc.*, 20 Cal.4th 1135, 1145 (1999) (citation omitted); *Kirk v. First Am. Title Ins. Co.*, 183 Cal.App.4th 776, 792 (2010).

A motion for sanctions may be heard at any time. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56 (1991). And, Civil L.R. 7-8(c) provides that a motion for sanctions “must be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate.”

IV. ARGUMENT

Based on applicable law and the facts at issue here, Google’s threats – to *eventually* seek sanctions against DDC’s *litigation* counsel, in *this* Court, based on filings at the PTAB (by DDC’s PTAB counsel), and based on alleged violation of *Texas* law and breach of a *Texas* agreement – lack merit.

As a preliminary matter, DDC was forced to bring this motion preemptively because it could not wait indefinitely until Google decided to make good on its repeated threats. Google’s threat to seek sanctions eventually, only after the stay is lifted in this case, ignores the law that sanctions motions may be brought at any time and Civil L.R. 7-8(c) requiring such motions to be

filed as soon as practicable after learning of the grounds supporting the same. Accordingly, DDC brings this motion to seek any and all relief that the Court may afford so that DDC can focus on the merits of the case currently being litigated at the PTAB and expected to return to this Court.

As detailed extensively in DDC's correspondence with Google, DDC's filing *under seal* of its POPRs did not breach the Mediation Agreement, which expressly created *confidentiality* obligations but not *non-use* obligations. Nor did DDC's POPRs violate any applicable Texas law or Fed. R. Evid. 408. (See Haller Decl. ¶¶ 8 and 10, Ex. C and Ex. E). Ironically (and a clear defense to a breach of contract claim), Google immediately breached the same Mediation Agreement by refusing to mediate in good faith as required by its express terms. (See Haller Decl. ¶ 8, Exhibit A to Ex. C). Google also expressly removed the allegedly offending information used by DDC in its POPRs from the scope of the Mediation Agreement in emails on July 24, 2023 (See Haller Decl. ¶ 8, Exhibit B, p. 1 to Ex. C and Exhibit C, p. 1 to Ex. C). In short, based on the actual facts, Google's claims of breach/violation are devoid of merit and would have been rejected by any proper authority considering the same.

If, despite the obvious flaws in its position, Google honestly believed that DDC committed some wrong, Google had two appropriate venues, and numerous options therein, to seek formal relief rather than extort such relief from DDC via sanctions threats against DDC's NDCAL counsel (who have not even appeared in the PTAB proceedings). (See Haller Decl. ¶¶ 8 and 10, Ex. C and Ex. E).

First, Google could have immediately sought potential relief from a Texas court, presumably even the NDTEX – the court that required the mediation resulting in the Mediation Agreement that Google contends DDC breached, and a court in which Google counsel retained appearances since the Summer of 2022. *If* Google had any meritorious argument for breach of the

Texas Mediation Agreement (or violation of *Texas* state statute), a *Texas* court would have been the only appropriate forum to raise such a dispute. Such court with competent jurisdiction could have resolved the dispute and, if it agreed with Google’s tenuous arguments, it could have granted the very relief that Google demanded from DDC – expungement of facts from the PTAB filings. **Google never sought any relief from a Texas court – a tacit acknowledgement that such an effort would have failed.** Google’s waived any claim of “harm” by failing to seek relief from the most appropriate source, and in the time necessary to seek the relief it sought.

Second, Google could have pursued remedies at the PTAB. On August 2, 2023, Google’s PTAB counsel emailed DDC’s PTAB counsel: “We seek expungement of all arguments in the POPRs and exhibits relating to the mediation.” (Haller Decl. ¶ 12, Ex. G). DDC’s PTAB counsel responded that DDC “will not expunge the materials” and “would oppose a motion to strike.” (Id.). Google then requested and received permission from the PTAB to file replies to DDC’s PTAB filings and, therein, specifically argued:

Moreover, the bulk of DDC’s so-called evidence, which itself is insufficient to show RPI, is inadmissible and should be stricken because it violates a mediation agreement.... Therefore, DDC’s arguments and evidence about the mediation are inadmissible, violate the mediation agreement, and should be given no weight. Petitioner further respectfully requests that the Board strike this offending material or, alternatively, provide authorization to file a motion to strike.

(Haller Decl. ¶¶ 13-14, Ex. H-1, pp. 5-6 and Ex. H-2, pp. 5-6). DDC’s sur-reply thoroughly rebutted Google’s arguments of impropriety. (Haller Decl. ¶¶ 15-16, Ex. I-1 and Ex. I-2). Despite its suggestion in email of August 2nd, Google never affirmatively moved to strike the challenged facts from DDC’s POPRs nor sought sanctions at the PTAB. In fact, DDC’s PTAB counsel corresponded with Google’s PTAB counsel stating: “DDC believes that the PTAB would benefit from the additional context provided by both Mr. Snyder’s letter and Mr. Haller’s response, and we propose filing them as sealed exhibits in each of the four proceedings in which replies and sur-

replies have been filed. Please let us know whether Google agrees. If not, let me know when you're available to meet and confer by phone.” (Haller Decl. ¶ 17, Ex. J). On September 18, 2023, Google stated that it would not consent to submitting the correspondence to the PTAB. (Id.). Thus, **Google voluntarily forewent a motion to strike or sanctions request at the PTAB, and did not even permit DDC to file the letters detailing the issue with the PTAB – again, tacitly acknowledging the weakness of Google’s position.** Google cannot complain of “harm” at the PTAB when it forewent numerous opportunities to address any alleged harm with the PTAB.

Rather than pursue a motion to strike or sanctions at the PTAB, or seek relief for alleged breach of contract in Texas, Google enlisted its *NDCAL* counsel (circumventing its PTAB counsel) to send the September 5th letter threatening sanctions, in the *NDCAL*, against DDC’s *NDCAL counsel* (despite the allegedly offending materials being filed in the PTAB by DDC’s PTAB counsel). (See Haller Decl. ¶ 7, Ex. B).

Finally, Google’s contention that DDC violated Fed. R. Evid. 408 with its *under seal* POPR filings at the PTAB is unfounded. First, Google never made any offer of settlement, thus Rule 408 is inapplicable. Second, Rule 408 addresses admissibility of evidence – seeking to present evidence that is ultimately determined inadmissible does not constitute *misconduct*. Google’s arguments for sanctions based on an alleged violation of Rule 408 lack any merit.

Without reasonable legal or factual bases to threaten sanctions, the letters from Google’s *NDCAL* counsel can only be viewed as Google using the threat of sanctions to obtain tactical advantage in the civil proceedings at the PTAB and before this Court. The first letter of September 5th used the threat of sanctions against DDC’s counsel to intimidate DDC into taking action at the PTAB for Google’s benefit – a clear threat for the purpose of obtaining advantage at the PTAB. (See Haller Decl. ¶ 7, Ex. B). Each of Google’s letters further suggested that Google would seek

sanctions in this Court, *without any conduct having occurred in this Court since the case was stayed at Google's request in April*, a threat of sanctions for the purpose of seeking advantage in the very Court where the underlying litigation will resume after resolution at the PTAB. (See Haller Decl. ¶¶ 7, 9, and 11, Ex. B, Ex. D, and Ex. F). Google's conduct was improper and should be discouraged so that the Parties can focus on the merits of the pending proceedings.

V. CONCLUSION

In light of the foregoing, DDC requests prompt consideration and resolution of Google's threatened sanctions in DDC's favor.

Dated: October 26, 2023

Respectfully submitted,

/s/ Timothy J. Haller

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