

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Palm Beach Division

Case No. 05-80387-CIV (Ryskamp/Vitunac)

STEVEN A. SILVERS, an individual)
)
 Plaintiff,)
)
 v.)
)
 GOOGLE INC., a Delaware corporation)
)
 Defendant,)
)
 _____)
)
 GOOGLE INC., a Delaware corporation)
)
 Counterclaimant,)
)
 v.)
)
 STEVEN A. SILVERS, an individual;)
 STELOR PRODUCTIONS, INC., a Delaware)
 corporation; STELOR PRODUCTIONS, LLC;))
 a business entity of unknown form; and)
 STEVEN ESRIG, an individual,)
)
 Counterdefendants,)
)
 _____)

FILED BY: D.C.
 2005 OCT -5 PM 3:36
 CLERK U.S. DIST. CT.
 S.D. OF FL.-FTL.

GOOGLE’S RESPONSE TO PLAINTIFF’S MOTION TO COMPEL GOOGLE TO COMPLY WITH PRETRIAL PROCEDURES

Defendant and Counterclaimant Google Inc. ("Google") files this response to Plaintiff’s Motion to Compel Google to Comply With Pretrial Procedures.

1. As a preliminary matter, Google notes that, for a second time, Plaintiff has filed a motion without first conferring with opposing counsel, as required by S.D. Fla. L.R. 7.1.A.3. See Plaintiff’s Motion to Amend Complaint and Google’s Notice of Non-opposition.

2. Plaintiff has filed this motion seeking an order compelling Google to work with Plaintiff to finalize and file the Joint Scheduling Report and Proposed Scheduling Order pursuant to Rules 16 and

{JDA/213526.0001/N0569139_1}

Handwritten signature and initials, possibly 'RA' and '25'.

26 of the Federal Rules of Civil Procedure and the applicable local rules. In fact, Google has worked diligently to move this process forward.

3. On August 8, 2005, Google answered Plaintiff's complaint and counterclaimed against both Plaintiff and third parties, Stelor Production, Inc., Stelor Productions, LLC, and Steven Esrig (the "Stelor Counterdefendants").

4. On Thursday, August 18, 2005, Google's counsel held a telephonic conference with Plaintiff's counsel, Gail McQuilken, pursuant to Fed. R. Civ. Proc. 26(f) and 16 and S.D. Fla. LR 26.1 and 16.1. At the end of that call, Ms. McQuilken said she would try to send Google's counsel a draft Joint Scheduling Report by the following Monday, August 22, 2005.

5. More than two weeks later, on September 3, 2005, Ms. McQuilken finally sent Google's counsel a copy of the draft Joint Scheduling Report, but that draft did not accurately reflect the earlier discussion of counsel on the issues addressed in the report.

6. On September 9, 2005, the Stelor Counterdefendants filed a cross-claim against Silvers.

7. On September 15, 2005, Google's counsel called Ms. McQuilken concerning the draft Joint Scheduling Report and emphasized that the Stelor Counterdefendants should be brought into the discussions concerning the Joint Scheduling Report, as Rule 26(f) contemplates that "[t]he attorneys of records and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court" a written report outlining the plan. Fed. R. Civ. Proc. 26(f). Google's counsel also explained that Google intended to file a motion to bifurcate requesting that the Court first consider the validity and priority of Plaintiff's alleged trademark rights in the "Googles" mark, before addressing liability and relief issues, which Google did file on October 5, 2005. Ms. McQuilken stated that Plaintiff intended to file a motion to dismiss the Stelor Counterclaimants cross-claim, which Plaintiff did file on October 3, 2005. Because the Court's disposition of Google's motion to bifurcate and Silvers' motion to dismiss could significantly affect the scheduling for this case, and it would be unwieldy to furnish the Court a joint status report that provided guidance on case management that took into account the various

contingencies, Google's counsel suggested that the parties seek the Court's leave to extend the time for the parties to meet pursuant to Rule 26 and to file their Joint Scheduling Report until after resolution of these two motions. Ms. McQuilken stated that she would not oppose a motion to extend the time for the parties to file the Joint Scheduling Report.

8. Immediately after the September 15, 2005 call with Ms. McQuilken, Google's counsel called counsel for the Stelor Counterdefendants, Kevin Kaplan, to discuss the timing of the Joint Scheduling Report.

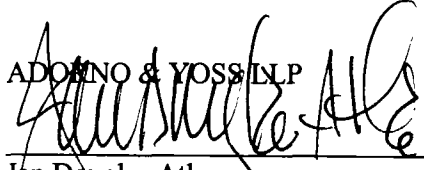
9. On September 20, 2005, Google emailed Ms. McQuilken and Mr. Kaplan a draft motion to extend the time for the parties to hold the Rule 26(f) conference and file the written report. Ms. McQuilken asked Google to make one edit and stated that she would not oppose the motion. See email from Gail McQuilken attached as Exhibit A. On September 22, 2005, having not heard back from Mr. Kaplan, Google's counsel again emailed him asking if his client would oppose the motion. Mr. Kaplan responded that he would oppose the motion. See email from Kevin Kaplan attached as Exhibit B.

10. Google has acted diligently to comply with the Court's Order of Pretrial Procedures and to move forward the Rule 26(f) meeting of counsel and the parties' Joint Scheduling Report in the most practical and efficient manner and in conformance with the applicable rules.

11. Accordingly, Google respectfully requests that the Court deny Plaintiff's Motion to Compel Google to Comply With Pretrial Procedures.

12. Google instead requests that the Court extend the time for all parties to hold a further conference pursuant to Fed. R. Civ. Proc. 26(f) until 14 days after a decision from the Court on both Google's pending motion to bifurcate and Silvers' pending motion to dismiss Stelor's cross-claim and extend the time for the parties to file their written report required by Fed. R. Civ. Proc. 26(f) and Local Rule 16.1-B.2, until seven days after they hold their Rule 26(f) conference. Google further requests that the Court order Plaintiff's counsel to include counsel for the Stelor Counterclaimants in such conference and report.

ADORNO & YOSS LLP



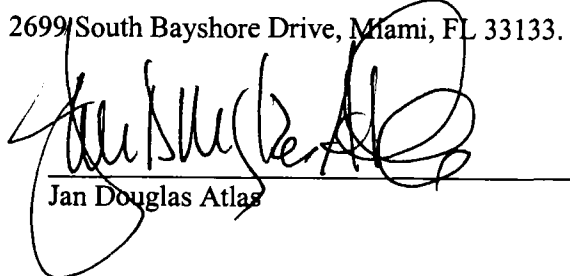
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Tel: (415) 591-1000
Fax: (415) 591-1400

Attorneys for Defendant and Counterclaimant
Google, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail on this ____ day of October, 2005 upon: HARLEY S. TROPIN, ESQ., KENNETH R. HARTMANN, ESQ. and GAIL A. McQUILKIN, ESQ., Kozyak, Tropin, Throckmorton, P.A., 2525 Ponce de Leon, 9th Floor, Miami, FL 33134; ADAM T. RABIN, ESQ., Dimond, Kaplan & Rothstein, P.A., 525 South Flagler Drive, Trump Plaza, Suite 200, West Palm Beach, FL 33401; and KEVIN C. KAPLAN, ESQ., Burlington, Weil, Schwiep, Kaplan & Blonsky, P.A., 2699 South Bayshore Drive, Miami, FL 33133.



Jan Douglas Atlas

From: "GAIL A MCQUILKIN" <GAM@kttlaw.com>
To: "Golinveaux, Jennifer" <JGolinveaux@winston.com>
Date: 9/22/2005 6:22:07 PM
Subject: RE: Silvers v. Google: Google's Motion re Rule 26(f)Conference and Statement

we do not oppose.

Gail A. McQuilkin, Esq.
Kozyak Tropin & Throckmorton, PA
2525 Ponce de Leon
Coral Gables, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
gam@kttlaw.com

>>> "Golinveaux, Jennifer" <JGolinveaux@winston.com> 09/21/05 5:47 PM >>>

Here it is with the change. Please confirm that plaintiff does not oppose.

-----Original Message-----

From: Gail A. McQuilkin, Esq. [<mailto:gam@kttlaw.com>]
Sent: Wednesday, September 21, 2005 12:00 PM
To: Golinveaux, Jennifer
Subject: Re: Silvers v. Google: Google's Motion re Rule 26(f) Conference and Statement

Jennifer

Please add after the statement that you intend to file a motion to bifurcate, that Silvers intends to oppose the motion to bifurcate. We should ok with everything else. Just let me see it after you make the change.
Thanks.

-----Original Message-----

From: "Jennifer Golinveaux" <JGolinveaux@winston.com>
Date: Tue, 20 Sep 2005 17:45:56
To: <kkaplan@bwskb.com>, <gmcquilkin@tmo.blackberry.net>
Cc: "Andrew Bridges" <ABridges@winston.com>
Subject: Silvers v. Google: Google's Motion re Rule 26(f) Conference and Statement

Counsel:

As discussed, attached please find Google's draft motion to extend the time for the parties to hold the Rule 26(f) conference and file the written report. We have drafted it as an unopposed motion. Please confirm that you do not oppose this motion.

Regards,

EXHIBIT A

Jennifer Golinveaux jgolinveaux@winston.com
Winston & Strawn LLP
101 California Street, Suite 3900
San Francisco, CA 94111
Telephone (415) 591-1506 Facsimile (415) 591-1400

<<SF-#115806-v2-Motion_to_extend_time_to_file_joint_stmt.DOC>>

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Gail A. McQuilkin, Esq.
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(305)372-1800 office
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From: "Kevin C. Kaplan" <kkaplan@bwskb.com>
To: "Golinveaux, Jennifer" <JGolinveaux@winston.com>
Date: 9/22/2005 6:40:18 PM
Subject: RE: Silvers v. Google: Google's Motion re Rule 26(f) Conference and Statement

Jennifer,

Thanks for your follow up email. We oppose the motion as drafted. We would have no opposition to a 15 or 20 day postponement of the conference, but we do not agree that the conference should be deferred pending resolution of motions that have not yet even been filed.

Kevin C. Kaplan, Esq.
Burlington, Weil, Schwiep,
Kaplan & Blonsky, PA
2699 S. Bayshore Drive, Penthouse
Miami, Florida 33133
Tel: (305) 858-2900
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kkaplan@bwskb.com

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-----Original Message-----

From: Golinveaux, Jennifer [<mailto:JGolinveaux@winston.com>]
Sent: Thursday, September 22, 2005 6:26 PM
To: Kevin C. Kaplan
Cc: Bridges, Andrew
Subject: RE: Silvers v. Google: Google's Motion re Rule 26(f) Conference and Statement

Kevin,

Please confirm whether your client opposes this motion.

Jennifer

EXHIBIT B

> -----Original Message-----

> From: Golinveaux, Jennifer

> Sent: Tuesday, September 20, 2005 5:46 PM

> To: 'gam@kttlaw.com'; 'kkaplan@bwskb.com'

> Cc: Bridges, Andrew

> Subject: Silvers v. Google: Google's Motion re Rule 26(f)
Conference and Statement

>

> Counsel:

>

> As discussed, attached please find Google's draft motion to extend the
time for the parties to hold the Rule 26(f) conference and file the
written report. We have drafted it as an unopposed motion. Please
confirm that you do not oppose this motion.

>

> Regards,

>

> _____
>

> Jennifer Golinveaux jgolinveaux@winston.com

> Winston & Strawn LLP

> 101 California Street, Suite 3900

> San Francisco, CA 94111

> Telephone (415) 591-1506 Facsimile (415) 591-1400

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> << File: SF-#115806-v2-Motion_to_extend_time_to_file_joint_stmt.DOC

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