

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ERICH SPECHT, et al.)	
)	C.A. No. 09-cv-2572
Plaintiffs,)	
)	Judge Leinenweber
v.)	
)	Magistrate Judge Cole
GOOGLE INC.,)	
)	
Defendant.)	

**GOOGLE’S RESPONSE TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE THEIR
THIRD AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT OF ITS
MOTION TO STRIKE SAME**

Days before the close of all fact discovery, and with written discovery closed for months and depositions scheduled to be completed, Plaintiffs now seek to add four additional so-called “Carrier Defendants,” based on facts that Plaintiffs have known since the filing of the original Complaint in April 2009. Indeed, Plaintiffs made the identical infringement allegations against two of the Carrier Defendants (T-Mobile and Sprint) in their Second Amended Complaint filed last fall, but made the conscious decision not to name them as defendants at that time. Now, nine months later, in a blatant attempt to derail the progress of this case -- especially Google’s looming motion for summary judgment that will be dispositive of all of Plaintiffs’ claims -- Plaintiffs egregiously seek to add four new defendants and an additional mark to this 1 ½ year old case, while at the same time refusing to proceed with the remaining agreed upon depositions. Unsurprisingly, the remaining witnesses are primarily Plaintiffs’ witnesses.

Plaintiffs’ Motion for Leave confirms what has been apparent all along -- that the purpose of this litigation is not to address purported confusion in the marketplace between Google’s “Android” operating system and Plaintiffs’ non-existent “Android Data” software, but rather to

shake down Google and other perceived “deep pockets” for nuisance value settlements. Plaintiffs readily admit that their motivation for now attempting to bring in the Carrier Defendants (despite previously identifying them as infringers in the Second Amended Complaint) is because Google “essentially earns no revenue” from its Android operating system (Motion for Leave, Dkt. No. 217, ¶¶ 6-7.) Of course, it has always been widely known that, as a piece of “open source” software, the Android OS is available for download basically free of charge -- hence, Plaintiffs’ repeated attempts to name other defendants in this case, all in the hope that, as Plaintiffs’ counsel Mr. Murphy told a Forbes reporter in 2009:

No judge will want to be flooded with that much paperwork. We’ll probably be asked to sit down and work this out. (Ex. 5).

Indeed, as Google will address in its Motion to Compel necessitated by Plaintiffs’ gamesmanship, Plaintiffs are attempting to parlay their Third Amended Complaint into an excuse to cause further delay. On July 15 (the day after Plaintiffs completed their Rule 30(b)(6) deposition of Google) Plaintiffs’ counsel advised the undersigned by phone that Plaintiffs were unilaterally canceling all depositions of Plaintiffs’ witnesses (including, most notably, Plaintiff Erich Specht) that were scheduled to occur prior to the July 30 close of oral discovery. Plaintiffs’ contrived basis for cancelling the depositions was that the parties should stay all discovery until after the new defendants have answered the Third Amended Complaint, the Court has re-opened discovery, and has established a new close for that discovery. After Google pointed out, in that telephone conversation, that the Third Amended Complaint was not properly before the Court because Plaintiffs had not bothered to seek leave of Court or Google’s consent, Plaintiffs hastily filed their Motion for Leave later that evening.

As set forth below, because Plaintiffs filed the Third Amended Complaint without leave of Court or Google’s written consent, the Third Amended Complaint is a nullity and without

legal effect, and therefore should be struck from the record. Moreover, Plaintiffs' Motion for Leave should be denied because it is untimely in view of the Court's setting of October 6, 2009 as the date that parties could be added and in view of Plaintiffs' undue delay in seeking leave to amend, their dilatory and bad faith tactics, and the resulting prejudice to Google.

I. BACKGROUND

Plaintiffs' opportunity for adding new defendants has long passed. Plaintiffs' original Complaint, filed on April 28, 2009, named 48 separate entities as defendants, including "T-Mobile" and "Sprint Nextel" (Dkt. No. 1). Plaintiffs filed a First Amended Complaint on June 4, 2009 (Dkt. No. 38), naming a total of 53 separate defendants, again including "Sprint Nextel" and "T-Mobile." On August 3, 2009, this Court dismissed all of the named defendants other than Google, based on Plaintiffs' failure to state a claim against any of them (Dkt. No. 113, published at 660 F.Supp.2d 858). The Court further granted Plaintiffs leave to file a Second Amended Complaint adding in any former or other defendants where Plaintiff "provides supporting factual information of some specificity as to each individual defendant" (Id., p. 20). The Court initially set October 1, 2009 as the deadline for Plaintiffs to file a Second Amended Complaint (Dkt. No. 125), which was later extended to October 6, 2009 (Dkt. No. 126).¹

On October 6, 2009, Plaintiffs filed their Second Amended Complaint (Dkt. No. 134), naming only Google as a defendant. In addition to claims of direct trademark infringement under 15 U.S.C. §1114 (Count I) and §1125(a) (Count II), the Illinois Deceptive Trade Practices Act, 815 ILCS 510/2 (Count III), and common law (Count IV), Plaintiffs also alleged that Google engaged in contributory infringement (Count V) by intentionally inducing others,

¹ Plaintiffs' representation in their Motion for Leave that "[t]he Court did not set a deadline for Plaintiffs to file the second amended complaint" (Motion for Leave, p. 1) is simply wrong. Indeed, Mr. Shonkwiler was present at the September 3, 2009 status hearing where the Court made clear that Plaintiffs were being granted only 28 days to bring in additional parties by way of an amended complaint (Ex. 1, pp. 5-6).

including T-Mobile and Sprint, to infringe Plaintiffs' alleged trademarks by "marketing and selling mobile phones and related services that use the Google Android software platform, and by using the mark 'Android' on or in connection with such products, services and marketing materials" (see *Id.*, ¶¶ 60, 62, 80-81, 120-121). **Notably, Plaintiffs' Second Amended Complaint specifically alleged that both T-Mobile and Sprint had "infringed Plaintiffs' marks by, among other things . . . using the mark 'Android' on or in connection with [its] products, services and marketing materials" (*Id.*, ¶¶ 80-81).**

Google filed its Answer and Counterclaims on October 23, 2009 (Dkt. No. 136), and discovery proceeded on the claims set forth in the Second Amended Complaint. On February 23, 2010, the Court entered an Order setting the deadline for amending the pleadings for July 15, 2010 and the close of oral discovery for July 31, 2010 (Dkt. No. 174). Both Plaintiffs and Google have taken depositions under that Order, and only a handful of depositions remain to be completed before the July 30 oral discovery close -- including, notably, Google's deposition of Plaintiff Erich Specht, scheduled by agreement to take place on July 21, and Plaintiffs' original trial counsel and purported customer, Martin Murphy, scheduled by agreement to take place on July 30.²

II. PLAINTIFFS' THIRD AMENDED COMPLAINT

On July 13, 2010, a handful of days before the scheduled close of fact discovery, Plaintiffs filed a purported Third Amended Complaint (Dkt. No. 216), without seeking or obtaining leave of Court or Google's written consent. In addition to recycling Plaintiffs' claims against Google for direct and contributory trademark infringement (Counts I – V), Plaintiffs have

² Mr. Murphy was ordered to appear for this second deposition as a result of the improper tactics of Mr. Murphy and Plaintiffs' lead counsel Mr. Fleming at the original deposition of Mr. Murphy (Dkt. No. 215). Plaintiffs current refusal to produce Mr. Murphy is a blatant violation of that Order, which only raises further questions as to whether Plaintiffs have otherwise complied with the Court's June 25th Sanctions Order.

attempted to add four additional defendants, namely T-Mobile USA, Inc. (“T-Mobile”), Sprint Nextel Corporation (“Sprint”), Cellco Partnership d/b/a Verizon Wireless (“Verizon”), and AT&T Mobility LLC (“AT&T”), and have attempted to assert similar counts of trademark infringement under 15 U.S.C. §1114 (Count VI) and §1125(a) (Count VII), the Illinois Deceptive Trade Practices Act, 815 ILCS 510/2 (Count VIII), and common law (Count IX) against each of them.

In addition to the new defendants and counts, Plaintiffs have added new legal theories never before identified in Plaintiffs’ earlier pleadings. Plaintiffs for the first time allege that among the purported “Android Marks” infringed by Google and the other defendants is the purported trademark “Android’s Dungeon” (TAC, Dkt. No. 216, ¶19). Although The Android’s Dungeon, Inc. has been a Plaintiff in the case since the filing of the original Complaint in April 2009, prior to the filing of the Third Amended Complaint, Plaintiffs have never identified, in their pleadings or otherwise, “Android’s Dungeon” as a purported trademark at issue.

III. PLAINTIFFS’ THIRD AMENDED COMPLAINT WAS FILED WITHOUT LEAVE OF COURT OR GOOGLE’S WRITTEN CONSENT, AND THEREFORE IS WITHOUT LEGAL EFFECT AND MUST BE STRUCK FROM THE RECORD

It is undisputed that Plaintiffs failed to even seek, much less obtain, either leave of Court or Google’s written consent prior to filing the Third Amended Complaint. As such, the Third Amended Complaint is without legal effect and therefore must be struck from the record.

Under Fed.R.Civ.P. 15(a)(2), after service of a responsive pleading a party may amend its complaint “only with the opposing party’s written consent or the court’s leave.” *In re Ameritech Corp.*, 188 F.R.D. 280, 282 (N.D.Ill. 1999). The law is clear that any amended complaint filed without leave of Court or the consent of all parties “is a nullity” and therefore has no legal effect. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985); *Schmude v. Sheahan*, 2004 WL 887376, *3 n.3 (N.D.Ill. Apr. 23, 2004). *See also* WRIGHT & MILLER,

FEDERAL PRACTICE & PROCEDURE §1484 (3rd ed. 2010) (“[I]f an amendment that cannot be made as of right is served without obtaining the court’s leave or the opposing party’s consent, it is without legal effect and any new matter it contains will not be considered unless the amendment is resubmitted for the court’s approval.”); *U.S. ex rel. Mathews v. HealthSouth Corp.*, 332 F.3d 293, 296 (5th Cir. 2003) (where plaintiff needed leave of court under Rule 15(a) to file an amended complaint, “[t]he failure to obtain leave results in an amended complaint having no legal effect”).

Because Plaintiffs’ Third Amended Complaint was filed without leave of Court, it is a “nullity” and without legal effect, and should accordingly be struck from the record. *See Fonseca v. Nelson*, 2009 WL 2020809, *2-3 (S.D.Ill. July 9, 2009) (granting motion to strike amended complaint filed without seeking leave of court); *Slane v. Emoto*, 582 F.Supp.2d 1067, 1087 (W.D.Wis. 2008) (noting that plaintiff’s failure to file a motion under Rule 15(a) before adding a new cause of action was “reason enough to grant the motion to strike”); *Burt Development Co. v. Board of Commissioners of Lee County, Georgia*, 230 Fed. Appx. 910, 914 (11th Cir. 2007) (district court properly struck amended complaint filed without leave of court or written consent of defendant).

Plaintiffs’ suggestion that “they acted properly by filing the TAC within the time frame set forth in the Court’s February 23, 2010 Order, which granted the parties leave to amend the pleadings by July 15, 2010” (Motion for Leave, Dkt. No. 217, p. 3) reflects a fundamental misrepresentation of the Federal Rules. Rule 15(a) clearly and unambiguously requires a party to obtain either leave of court or written consent of all parties to file an amended complaint after an answer has been served. The scheduling order deadline for amendments to the pleadings does not serve to somehow erase that requirement; rather, at most, it serves as a cutoff for determining

whether requests for leave to amend a pleading are treated under the standard of Rule 15(a) or the “good cause” standard of Rule 16(b). *See Intel Int’l Group, Ltd. v. Neergheen*, 636 F.Supp.2d 677, 689 (N.D.Ill. 2009) (noting that Rule 16(b) applies to requests to amend a pleading after expiration of the scheduling order deadline to amend pleadings).

IV. PLAINTIFFS’ REQUEST FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT IS UNTIMELY, AND IN VIOLATION OF THE COURT’S ORDER AND SHOULD BE DENIED

Contrary to Plaintiffs’ assertion, the Court did in fact set a date by which Plaintiffs were to add parties. As explained above, the Court granted Google’s Motion to Dismiss all defendants other than itself. (Dkt. No. 113). While that Order did not set a date certain by which Plaintiffs were to file a Second Amended Complaint which could add parties, the hearing on September 3, 2009 clarified that any amendment to the complaint to add parties must be filed within “28 days” (Ex. 1, p. 5-6), which became October 6, 2009 (Dkt. Nos. 125 and 126). Accordingly, the Court clearly set the last date by which parties could be added as October 6, 2009. Despite filing a Second Amended Complaint that recites and specifically identifies purported additional infringers, Plaintiffs did not name any additional defendants. Having purposefully chosen not to name additional defendants by the Court imposed October 6th deadline, Plaintiffs should not be permitted to blatantly disregard the Court’s prior Order mere days before the close of oral discovery.

V. PLAINTIFFS’ ELEVENTH-HOUR REQUEST FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT LACKS JUSTIFICATION AND SHOULD BE DENIED

As noted above, Plaintiffs’ attempt to file a Third Amended Complaint days before the close of oral fact discovery comprises an act of desperation by a litigant who understands that time is running out on its charade, and wishes to delay in order to continue burdening Google (and this Court) with the defense of this suit -- all in the hopes of leveraging a nuisance-value

settlement before their claims are summarily disposed of. The Court should deny Plaintiffs request for leave to file a Third Amended Complaint, in view of Plaintiffs' undue delay, dilatory and bad-faith motive, and lack of any justification or explanation for their eleventh hour filing, combined with the resultant prejudice to Google should the amendment be permitted.

The law concerning whether to grant leave to file an amended complaint is well settled:

Although leave to amend shall be freely given when justice so requires, Fed. R. Civ. P. 15(a), leave is inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment.

Jacobs v. Xerox Corp. Long Term Disability Income Plan, 520 F.Supp.2d 1022, 1045-46 (N.D.Ill. 2007) (citing *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991)). See also *Johnson v. Methodist Medical Center of Illinois*, 10 F.3d 1300, 1303 (7th Cir. 1993) (noting that "leave to amend is not to be automatically granted").

The Seventh Circuit has further explained that, "the longer the delay, the greater the presumption against granting leave to amend . . . [and] extreme delay itself may be considered prejudicial." *Jacobs*, 520 F.Supp.2d at 1046 (citing *King v. Cooke*, 26 F.3d 720, 723 (7th Cir. 1994)). Moreover, where, as here, a party seeking an amendment knows of the facts upon which the proposed amendment is based, but fails to assert them in a timely fashion, the amendment will be denied. *In re Ameritech Corp.*, 188 F.R.D. at 284.

Further, undue prejudice occurs when an amendment "brings in entirely new and separate claims, adds new parties, or at least entails more than an alternative claim or a change in the allegations of the complaint" and when an amendment requires additional discovery which is "expensive and time consuming." *Jacobs*, 520 F.Supp.2d at 1046. One of the most important considerations in determining whether an amendment would be prejudicial is the degree to which

it would delay the final disposition of the action. *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 88 (2nd Cir. 1998).

Granting leave to Plaintiffs to file the TAC would be patently inappropriate, inasmuch as (i) Plaintiffs have unduly delayed in attempting to add the additional defendants and theories, (ii) Plaintiffs have exhibited bad faith and a clear dilatory motive by attempting to use their stall tactic to further delay completion of discovery, and (iii) permitting Plaintiffs to add new defendants and theories at this late hour would result in prejudice to Google. As another Court in this District has noted:

Plaintiffs' eleventh hour efforts to amend their complaint . . . works a substantial burden on the Court's ability to manage its docket. It is simply unreasonable for a plaintiff to ask the Court to manage his or her case in a piecemeal fashion one claim at a time as the plaintiff sees fit to bring them. Litigation is not a card game where a party reveals one card or claim at a time. Such piecemeal litigation is not only prejudicial to the defendant but also precludes the Court from adjudicating the case in a timely and efficient manner.

Fry v. UAL Corp., 895 F.Supp. 1018, 1052 n.33 (N.D.Ill. 1995).

A. Plaintiffs Have Unduly Delayed in Attempting to Add New Defendants and Claims to This Case

As noted in Sec. I, *supra*, Plaintiffs lodged their allegations of infringement against the carrier related defendants, at least Sprint and T-Mobile, in their original Complaint filed in April 2009 and again in their First Amended Complaint filed in June 2009 (Dkt. Nos. 1, 38). Moreover, in October 2009 Plaintiffs included in their Second Amended Complaint detailed allegations accusing carrier related defendants, including both Sprint and T-Mobile of infringing Plaintiffs' purported trademark rights by, "among other things, marketing and selling mobile phones and related services that use the Google Android software platform, and by using the mark 'Android' on or in connection with such products, services and marketing materials" (Dkt. No. 134, ¶¶ 80-81). Plaintiffs explicitly chose not to include additional "carrier defendants" in

this lawsuit -- owing no doubt to the meritless legal theories on which Plaintiff's allegations are based. Plaintiffs cannot now reverse that decision days before the close of discovery, without any explanation or justification for their delay in adding defendants that could have been named (*albeit* without merit) in October 2009. *See Jacobs*, 520 F.Supp.2d at 1046 (noting the fact that plaintiff was aware of his potential need to name additional defendants "for well over a year before Plaintiff filed the proposed third amended complaint," but offered no reason to justify the delay).

Further, with regard to proposed new defendants Verizon and AT&T, Plaintiffs can point to no information developed through discovery that justifies their attempt to add them as defendants at this late hour. To the contrary, Plaintiffs' own proposed pleading alleges that the alleged acts of infringement by Verizon took place starting in November 2009 (TAC, Dkt. No. 216, ¶¶ 71-75) and the alleged acts of infringement by AT&T took place starting in March 2010 (*Id.*, ¶¶ 76-77). Moreover, Verizon and Google announced even earlier, in October 2009, that Verizon intended to introduce phones utilizing the Android operating system into the marketplace (Ex. 2).³

Notably, Plaintiffs do not claim in their Motion for Leave that they only learned of these alleged acts of infringement recently through discovery—apparently, even Plaintiffs are not willing to stretch their credibility that far. Indeed, Plaintiffs do not (and cannot) deny that they were well aware of the sale and proliferation of phones using the Android operating system long before taking the Rule 30(b)(6) deposition of Google last week.

Thus, extending every benefit of the doubt to Plaintiffs, the evidence shows that Plaintiffs knew (or at the very least should have known, considering the widespread publicity afforded to

³ Furthermore, Plaintiffs have served multiple subpoenas on Verizon beginning as early as March 2010, attempting to obtain documents from Verizon relating to purported infringing products.

the products at issue) of the alleged infringement by Sprint, T-Mobile and Verizon by October 2009, and by AT&T in February 2010 -- when the parties were still in the process of completing written discovery, which did not close until March 31, 2010. However, armed with this knowledge, Plaintiffs chose not to seek leave to add any of the new defendants until July 15 -- days before the close of all fact discovery. Granting the requested leave would inevitably delay the conclusion of this litigation by months, if not years, by the time the additional defendants appear, the pleadings are closed and discovery is reopened with respect to the Carrier Defendants. This fact alone justifies denial of Plaintiffs' Motion for Leave. *See Lerch v. City of Green Bay*, 218 Fed. Appx. 502, 505 (7th Cir. 2007) (affirming denial of leave to amend complaint which "would have required additional discovery and unduly delayed the case").

Plaintiffs' claim in their Motion to Leave that they "added the Carrier Defendants to the TAC because of information learned in discovery" (Motion for Leave, Dkt. No. 217, ¶5) is mere window-dressing, is unsupported, and entirely contradicted by their prior behavior. Plaintiffs accused T-Mobile and Sprint of infringement (presumably based on a good faith factual basis) fifteen months ago, and directly alleged infringement by those companies nine months ago in the Second Amended Complaint. While Plaintiffs now feign "surprise" that Google earns no significant revenues from its Android software (Motion for Leave, Dkt. No. 217, p. 1), they ignore the fact that they were apprised as early as October 2009, through Google's Supplemental Responses to Plaintiffs' First Set of Interrogatories, that Google "has not collected any fees or revenues in association with the release or download of either the Android OS or the Android SDK" (Ex. 3, p. 15). Thus, to the extent that Plaintiffs believe this fact necessitates adding additional defendants to the case (a connection which, frankly, is entirely unclear), they have likewise had that information for nine months.

Plaintiffs' unexplained delay in adding the Carrier Defendants until the eve of the fact discovery cutoff requires denial of their Motion for Leave. *See Jacobs*, 520 F.Supp.2d at 1046 (denying leave to amend complaint where plaintiffs were aware of his potential need to sue additional parties a year in advance of seeking leave to do so, and offered no reason to justify the delay); *In re Ameritech Corp.*, 188 F.R.D. at 284 (denying leave to amend counterclaim where the defendant was aware of the facts giving rise to the amendment long before seeking leave, and did not offer the proposed amendment until more than a year after commencement of the action and over eight months after it served the first amended counterclaim).

B. Plaintiffs' Eleventh Hour Filing is Yet Another Bad Faith Tactic Calculated to Delay the Resolution of this Case

It is no secret to Plaintiffs that Google intends to file a motion for summary judgment in short order, on the basis that Plaintiffs possess no trademark rights whatsoever -- which Google is confident will result in judgment in its favor on all Plaintiffs' counts. As a result, Plaintiffs' litigation strategy has been to delay the inevitable for as long as possible, in the apparent hope that the passage of time (and mounting legal fees) will enable them to leverage a nuisance value settlement from Google. As part of that strategy, on June 8, 2010 Plaintiffs moved for an extension of the oral discovery deadlines, based on speculation that Plaintiffs would require some unspecified "follow-up discovery" after deposing Google's Rule 30(b)(6) witnesses (Dkt. No. 206). When the Court logically continued Plaintiffs' motion until after those depositions were scheduled to take place (Dkt. 213), Plaintiffs apparently began to cast about for a new delay tactic, and settled on this one.

The dilatory and bad faith nature of Plaintiffs' filing was confirmed on July 15, 2010, when Plaintiffs' counsel Mr. Shonkwiler called the undersigned and informed him that Plaintiffs are now refusing to make Mr. Specht, Mr. Murphy or any other witness they represent available

for deposition as scheduled, on the basis that discovery should be suspended until after the Carrier Defendants have answered the Third Amended Complaint, discovery is reopened and a new discovery schedule has been entered by the Court (Ex. 4).⁴ Clearly, Plaintiffs' filing of the Third Amended Complaint comprised nothing more than a tactic calculated to stall depositions, especially of Plaintiff Erich Specht, and delay Google's motion for summary judgment by months, and bring in additional defendants who might exert further leverage on Google to make a sizeable settlement offer.

C. The Proposed Amendments Would Result in Prejudice to Google

The requested amendment would result in prejudice to Google by delaying resolution of this case, when in reality discovery is all but complete. One of the most important considerations in determining whether an amendment would be prejudicial is the degree to which it would delay the final disposition of the action. *Krumme*, 143 F.3d at 71. *See also In re Ameritech Corp.*, 188 F.R.D. at 284 ("Delay and prejudice . . . reinforce each other") (citation omitted). Here, the close of fact discovery is scheduled for July 30 – two weeks away -- and Google intends to move for summary judgment on all of Plaintiffs' claims, on the basis that Plaintiffs' alleged trademark rights are illusory and non-existent.

If the proposed amendment were permitted, and Plaintiffs' request to stay further discovery were granted, the resolution of this case would be delayed by months, if not years, pending completion of the pleadings and further discovery involving Plaintiffs and the Carrier Defendants. Such a delay, if permitted, would be clearly prejudicial to Google, which should be entitled to end this charade as soon as possible, consistent with the Court's original Scheduling Order. *See In re Enron Corp.*, 367 B.R. 373, 381 (S.D.N.Y. 2007) (noting that proposed

⁴ Of course, Plaintiffs made this unilateral cancellation a day after Plaintiffs completed the Rule 30(b)(6) depositions of Google.

amendment to complaint would be especially prejudicial “[g]iven the amount of discovery that has been completed . . . and that a summary judgment motion will shortly be filed”). Moreover, the delay would essentially be pointless, as nearly all relevant discovery has already been had.

VI. THE COURT SHOULD STAY THE DEADLINES FOR GOOGLE AND THE CARRIER DEFENDANTS TO ANSWER OR OTHERWISE RESPOND TO THE THIRD AMENDED COMPLAINT

Because the Third Amended Complaint is not properly before the Court, Google respectfully requests that, in the event the Court does not rule on this Motion and Plaintiffs’ Motion for Leave at the scheduled hearing on July 20th, but rather takes the matter under advisement, any deadline for Google to answer or otherwise respond to the Third Amended Complaint should be stayed pending resolution of this Motion. Further, because Plaintiffs have issued summons for the Carrier Defendants, indicating that they intend to attempt to serve their improperly filed Third Amended Complaint on those parties, the Court should likewise stay any answer or response deadlines for the Carrier Defendants.

VII. CONCLUSION

For the reasons set forth herein, Google respectfully requests that the Court strike or dismiss, with prejudice, Plaintiffs’ purported Third Amended Complaint (Dkt. No. 216), denying Plaintiffs leave to refile same. Further, Google requests that the Court stay the deadlines for Google and the Carrier Defendants to answer or otherwise respond to the Third Amended Complaint, which is not properly before the Court.

Respectfully submitted,

Dated: July 16, 2010

/s Herbert H. Finn

Herbert H. Finn

Richard D. Harris

Jeffrey P. Dunning

Cameron M. Nelson

GREENBERG TRAURIG, LLP

77 W. Wacker Drive, Suite 3100

Chicago, IL 60601

(312) 456-8400

Counsel for Google Inc.