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

ERICH SPECHT, an individual and doing business as ANDROID DATA CORPORATION, and THE ANDROID'S DUNGEON INCORPORATED,	)	
Plaintiffs/Counter-Defendants,	)	
v.	)	Civil Action No. 09-cv-2572
GOOGLE INC.,	)	Judge Harry D. Leinenweber
Defendant/Counter-Plaintiff.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS TO STRIKE [ECF 332, 333] GOOGLE'S POST-JUDGMENT MOTION FOR ATTORNEY FEES AND SANCTIONS [ECF 314]

Plaintiffs Erich Specht, an individual and doing business as Android Data Corporation and The Android's Dungeon Incorporated (collectively, "Plaintiffs"), by and through their attorney, and for Plaintiffs' reply in support of the motions to strike [ECF 332, 333] state as follows:

Once again, in an obvious attempt to mislead the Court and cause confusion, Mr. Finn has improperly combined Google's response to the motions to strike with its reply. Mr. Finn claims he did so because the "Court granted Google leave to file a single oversize brief responding to all of the papers filed by Plaintiffs and their counsel." That is not what the Court ordered. On April 28, 2011, the Court, ordered that: Google shall file its Reply by June 2, 2011 and file its response to Plaintiffs' Motions to Strike by May 19, 2011. [ECF 336]. The Court subsequently granted Google's oral motion to file its response by June 2, 2011. [ECF 351]. The Court never authorized Google's attorneys to file a joint response and reply. As a result of the confusion caused by Mr. Finn's disregard for the Court's Order, some of the arguments may

appear redundant because it is unclear which portion of Google's Reply Memorandum is actually a reply and which portion is intended to be a response.

This is only Plaintiffs' Reply in support of their Motion to Strike Google Inc.'s Motion for Attorney's Fees and Sanctions. In reply and support of their motions to strike, Plaintiffs state:

I. GOOGLE'S POST-JUDGMENT MOTION FOR ATTORNEYS' FEES IS A MOTION TO ALTER OR AMEND THE JUDGMENT AND, THERFORE, IS GOVERNED BY RULE 59(e)

a. The Holding in *Hairline Creations* is Good Law

In its Reply, Google claims that the holding in *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652 (7th Cir. 1981) is "no longer good law" on the issue of whether a motion for fees under § 1117 (a) is a Rule 54(d) (2) motion or a Rule 59(e) motion. [ECF 352 at p. 1]. In support of its erroneous position, Google makes three meritless arguments:

1. Google erroneously argues that the holding, in *Hairline Creations*, was merely designed to limit the time for filing a motion for fees to the 10 days set forth in Rule 59(e) because, in 1981, when *Hairline Creations* was decided, Rule 54 did not yet have a time limit;
2. Google erroneously argues that the Supreme Court implicitly overruled *Hairline Creations*, in the *White* and *Budinich* cases; and
3. Google erroneously argues that the 1993 amendment to Rule 54(d)(2), limiting the filing date for motions under Rule 54(d) (2) to fourteen days after entry of judgment made it unnecessary for the Courts to reexamine the *Hairline Creations* holding.

b. Under The Lanham Act, Attorneys' Fees Are Damages, Not Costs.

The sole issue decided in the *Hairline Creations* case was whether attorneys' fees under § 1117 (a) are damages or costs. In most cases, costs are awarded to a prevailing party after judgment. In some cases, such as the ones cited by Google, attorneys' fees are awarded to the prevailing party as a non-taxable cost. In contrast, attorneys' fees under § 1117 (a) are damages not costs. In other words, they are awarded as part of a judgment.

In *Hairline Creations,* the Seventh Circuit ruled that attorneys' fees under § 1117 (a) are damages. This holding has never been successfully challenged and is still good law. *Hairline Creations* held that attorneys' fees under § 1117 (a) are governed by Rule 59(e) because, the attorneys' fees are a form of damages which are substantively tied to the facts and legal issues resolved by the Court at judgment. More specifically, in *Hairline Creations,* the Court held that:

> The legislative history and statutory framework of §1117 thus set forth two basic characteristics of the attorneys' fees provision. First, the award of attorneys' fees is to be predicated upon a finding that the substantive violations of the trademark statutes are "exceptional." The exercise of discretionary authority to award attorneys' fees is inextricably intertwined with the factual and legal issues that the trial court resolves at judgment. Second, the award of attorneys' fees is merely one of several potential remedies for trademark violations. This remedy would be awarded, as would other statutory remedies, at final judgment. A motion for attorneys' fees would, therefore, require the trial court to reexamine the basis of the judgment to determine if the "exceptional" requirement has been met so as to justify the remedy. This characterization of § 1117 leads inescapably to the conclusion that a postjudgment motion for attorneys' fees is a motion to alter or amend the judgment.

Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 658 (7th Cir. 1981).

Contrary to Google's argument, *Hairline Creations,* is still good law and has been cited in this Circuit as good law as recently as 2004. (See for e.g. *Roulo v. Russ Berrie & Co.*, Inc., 886 F. 2d 931, 942 (7th Cir. 1989); *TE-TA-MA TRUTH v. World Church of the Creator*, 392 F. 3d 248, 260 (7th Cir. 2004).

c. The Holdings in *White* and *Budinich* Do Not Apply To Lanham Act Cases

In *White,* the Supreme Court was asked to determine if attorney fees awarded pursuant to 42 U.S.C. § 1988 are costs, governed by Rule 54(d), or damages, governed by Rule 59(e). *White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445 (1982). The Court held that because the attorney's fees allowed under § 1988 are not damages, i.e. compensation, they must be costs. *Id.* However, under § 1117 (a), attorney fees are awarded as compensation in "exceptional" cases. The Court in *White* held that attorneys' fees under § 1988 are uniquely separable from the cause of action to be proved at trial. *White,* at 451-452. Under § 1117 (a), they are not. Under § 1988, the decision of entitlement to fees requires an inquiry separate from the decision on the merits — an inquiry that cannot even commence until one party has "prevailed." *White,* at 452. Under § 1117 (a), entitlement to fees requires an inquiry which is directly related to a decision on the merits. Thus, the decision in *White* either supports the holding in *Hairline Creations,* or is irrelevant to this case.

In the second case cited, *Budinich v. Becton Dickinson & Co.*, 486 US 196 (1988), Google doesn't fair any better under The question before the Supreme Court in *Budinich* was jurisdictional; i.e. whether a decision on the merits is a "final decision" as a matter of federal law under § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined? *Id at* 199. The question was not whether attorneys' fees were costs or fees. That question was already answered by the statute awarding the fees. The attorneys' fees in *Budinich* were based upon a Colorado Law which provides that in a suit to collect compensation due from employment "the judgment . . . shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action." *Budinich,* at 197. The law already stated that they were costs. Accordingly, *Budinich* has no relevance to this case.

Ironically, Google also cites the non-precedential decision[1] in *SGS-Thomson Microelectronics, Inc., v. International Rectifier Corporation*, 31 F.3d 1177 (Fed. Cir. 1994) for the proposition that *Hairline Creations* has little precedential value. In *SGS-Thomson*, the Court stated:

> Finally, both SGS and IR cited in their briefs the nonprecedential decision *Katz* … Not only do the citations of a nonprecedential case constitute clear violations of Federal Circuit Rule 47.6(b), but, as cited by the parties, they are miscitations because they do not acknowledge the nonprecedential status of the case. That is, they omit "(table)." At the very least, this is misleading to the court, and we condemn such behavior.

Id.

Likewise Google should also be condemned for its use of the non-precedential decision in *SGS-Thomson* without disclosure to the Court. Apart from citing non-precedential and other irrelevant cases, Google has cited to no relevant authority for its argument that the holding in *Hairline Creations* is not still good law in this Circuit. Thus, the holding in *Hairline Creations* is still good law and a motion for attorneys' fees under § 1117(a) is governed by Rule 59(e) and not Rule 54(d) (2). *Hairline Creations*, at 658. Accordingly, Google's motion for attorney fees is a Rule 59(e) motion which requires it to prove "manifest error of law." Because Google cannot allege that the Court erred, the motion must be stricken as insufficient.

d. The 1993 Amendment to Rule 54(d) Is Irrelevant to Google's Rule 59(e) Motion and the Holding in *Hairline Creations.*

According to Google, the 1993 amendment to Rule 54(d) established a 14 day deadline to file motions for attorneys' fees and other non-taxable costs. However, as set forth above, attorneys' fees under § 1117 (a) represent compensation, not costs, and, therefore, are governed by Rule 59(e) and not Rule 54(d). Notwithstanding the fact that Google's motion for attorney's

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[1] In 2006 Federal Rules of Appellate Procedure Rule 32.1was added to permit the citation of non-precedential dispositions issued after January 1, 2007. A plain reading of the Rule indicates that it does not apply to decisions issued before 2007, such as the case cited by Google.

fees is an improper Rule 59(e) motion, Google's motion is still untimely under Rule 54(d) (2), as set forth below.

II. GOOGLE'S MOTION FOR FEES IS UNTIMELY BECAUSE IT WAS FILED EIGHTY-FOUR DAYS AFTER SUMMARY JUDGMENT WAS ENTERED

Google's motion for attorney fees is predicated upon the Summary Judgment Order entered on December 17, 2010 and not on the February 24, 2011 order dismissing Google's counterclaims. The Summary Judgment Order was granted and "entered" onto the public docket by the Clerk's Office on December 17, 2010. (See ECF 295, 296). [Exhibit 1]. Thus, even under Rule 54(d) (2), Google's motion which was not filed until March 22, 2011, 84 days after judgment was entered, is clearly untimely.

III. GOOGLE'S MOTION FOR SANCTIONS WAS IMPROPERLY BROUGHT AGAINST PLAINTIFFS

As set forth more fully in the motions to strike [ECF 332, 333], it is nearly impossible to ascertain what Google is asking for and from whom in its Motion for Attorney's Fees and Sanctions. [ECF 314]. In its' motion, Google asks the Court to award it one-million-dollars in fees and "as a sanction for vexatious conduct find counsel jointly and severally liable with Plaintiffs for Google's reasonable attorney's fees and nontaxable costs." [ECF 314 at p. 3]. In its' Reply, Google concedes that § 1927 does not provide a basis for sanctioning a party. [ECF 352 at p. 6]. Despite its prayer for relief in the motion, Google correctly admits that the motion for sanctions against Plaintiffs is improper. Accordingly, the motion for sanctions should be stricken.

WHEREFORE, for the reasons set forth above and in Plaintiffs' Motion to Strike, Google's motion for attorney fees and sanctions should be stricken and granting Plaintiffs such other and further relief as is appropriate under the circumstances including its fees in defending against Google's motion.

Respectfully submitted,
ERICH SPECHT, an individual and doing business as ANDROID DATA CORPORATION, and THE ANDROID'S DUNGEON INCORPORATED

By: /s/Martin J. Murphy

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CERTIFICATE OF SERVICE

Martin J. Murphy, an attorney, certifies that he caused copies of the foregoing to be served by electronically filing the document with the Clerk of Court using the ECF system this _ _9_ day of June, 2011.

/s/ Martin J. Murphy